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IN THE

Supreme Court of the United States

EARLINE CALDWELL, *et al.*,

Petitioners,

—VS.—

THE STATE OF MISSOURI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Question Presented for Review

Whether a court of appeals, without articulating its reasons and for surmised reasons that would be in conflict with decisions of this Court and of other courts of appeals, may summarily deny an application for attorneys' fees under 42 U.S.C. §1988 by school desegregation plaintiffs who previously have been declared prevailing parties within the meaning of §1988?

The Parties Below

Petitioners are Earline Caldwell, et al. ("Caldwell plaintiffs"), plaintiffs-intervenors in this school desegregation case. A list of all parties to the proceedings below in the Court of Appeals for the Eighth Circuit is contained in the caption of that court's opinion of 12 February 1981 (pp. 1a-9a, *infra*). In addition, the Special School District of St. Louis County was allowed, by order of 19 March 1981 (see p. 37a, *infra*), to intervene on appeal and file a petition for rehearing. Two parties have interests adverse to the questions presented by this petition: The State of Missouri and various of its agencies and officials ("State defendants"), and the St. Louis Board of Education and its members and officials ("St. Louis Board").

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EARLINE CALDWELL, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Opinions Below

The Eighth Circuit's opinion of 13 February 1981 and its order on rehearing entered 19 March 1981, not yet reported, are appended hereto.

Jurisdiction of This Court

The opinion and judgment of the Court of Appeals was entered on 13 February 1981. An order disposing, *inter alia*, of petitioners' timely petition for rehearing was entered on 19 March 1981. This petition is filed within 90 days of the latter date, thereby invoking this Court's jurisdiction under 28 U.S.C. §1254 (1).

Statute and Rule Involved

42 U.S.C. §1988 provides:

> The jurisdiction in civil and contempt matters conferred on the district courts by the provisions of this Chapter and Title 19, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

FED. R. APP. P. 39 provides:

> Costs
>
> (a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the

parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the Court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determina-

tion of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

Statement of the Case

This petition concerns a summary denial of attorneys' fees under 42 U.S.C. §1988 by the Court of Appeals for the Eighth Circuit. Petitioners, plaintiffs-intervenors who previously were declared prevailing parties below and who successfully defended a lower court victory on appeal, sought a ruling from the Eighth Circuit on whether they were entitled to fees covering appellate services. The Eighth Circuit responded to this request in a single sentence: "We hold that they are not." (p. 40a, *infra*). No reasons were given for the denial of fees.

This is the St. Louis school desegregation case. Since this multi-party case has now been before the Court of Appeals for the Eighth Circuit on three occasions, a brief history of the case is set forth hereafter to provide the procedural context of the question presented for review.

In *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977), the court of appeals reversed an order of the United States District Court for the Eastern District of Missouri denying petitioners' ("Caldwell plaintiffs") motion for leave to intervene in opposition to a proposed settlement of the case, entered into by the original Liddell plaintiffs and the St. Louis Board, which promised practically no actual school desegregation.

Thereafter, the United States intervened as a plaintiff, joining the Caldwell plaintiffs in seeking desegregation of the St. Louis public schools; the City of St. Louis and a white parent organization ("Adams") were also allowed

to intervene as plaintiffs, though they were opposed to the relief sought by the Caldwell plaintiffs and the United States; and, on motions of the Caldwell plaintiffs and the United States, the State defendants were added as parties-defendant. The case then proceeded to lengthy trial on both liability and remedy issues, resulting in a district court decision essentially absolving the St. Louis Board and State defendants of constitutional responsibility for the extensive segregated schooling extant in the St. Louis system. *Liddell* v. *St. Louis Bd. of Educ.*, 469 F. Supp. 1304 (E.D. Mo. 1979). The district court also held that "none of the parties are [sic] entitled to attorneys' fees and that each party shall bear its own costs." *Id.* at 1366; see also *id.* at 1390.

The Caldwell plaintiffs, the United States and the original Liddell plaintiffs appealed from the district court's refusal to order desegregation of the St. Louis schools (other parties also appealed, raising other issues, but not seeking desegregation). In *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 88 (1980), the court of appeals reversed the district court's judgment and remanded the case, with specific remedial guidelines, for the prompt development and implementation of a desegregation remedy. With respect to the question of costs and attorneys' fees,[1] the court of appeals held that Adams plaintiffs were not entitled to fees, but that the Liddell plaintiffs were. The court directed: "On remand, the district court shall determine reasonable attorneys' fees for the Liddell group (and for the Caldwell group, if they

[1] The Liddell and Adams plaintiffs had specifically appealed from the district court's denial of costs and fees. The Caldwell plaintiffs did not specifically raise the costs/fees issue on appeal, being of the view that the question of their entitlement to fees, as "prevailing parties" under 42 U.S.C. §1988, depended on the outcome of the appeal.

requested them). . . ." *Id.* at 1297.[2] As to fees for services on appeal, the court further directed (*id.*):

> The appellants requesting attorneys' fees on appeal shall submit a motion to that effect within thirty days of the filing of this opinion. Documentation of their claims shall be included.

By unreported order of 18 April 1980, the court of appeals awarded fees for services on appeal to the Caldwell and Liddell plaintiffs, holding that the State defendants were responsible for one-third of the award and the St. Louis Board for two-thirds.

Upon remand, the district court established an expedited plan-development and pre-hearing schedule, conducted a hearing, and entered its desegregation order on 21 May, with supporting findings and conclusions entered on 3 June 1980. *Liddell* v. *St. Louis Bd. of Educ.*, 491 F.Supp. 351 (E.D. Mo. 1980). The district court approved the plan of intradistrict desegregation proposed by the St. Louis Board of Education as complying with the remedial guidelines laid down by the *en banc* court of appeals. Despite compliance with those remedial guidelines, however, the approved plan left over 30,000 black public school children in the City of St. Louis in schools unaffected by desegregative pupil reassignments, i.e., in all-black schools. (The approved plan contained a desegregation limitation of integrating as many school as possible within the range of 30-50% black.) With particular reference to these remain-

[2] The Caldwell plaintiffs' motion for intervention, which was granted pursuant to the earlier mandate in *Liddell* v. *Caldwell supra*, had adopted the complaint of the original Liddell plaintiffs, which contained a prayer for costs and fees. Since the court of appeals' 1980 remand, the Liddell plaintiffs' claim for trial-level fees has been resolved, but the Caldwell plaintiffs' claim is pending negotiations.

ing segregated schools, the Board's plan contained a number of ancillary educational components (e.g., remedial and special programs, magnet schools) designed to help alleviate the unremedied vestiges of state-imposed school segregation in St. Louis. The district court approved these ancillary programs included within the total desegregation budget, which the State defendants, because of the district court's findings of joint State liability, were required to fund to the level of one-half of actual desegregation expenditures within the established budget ceiling. In addition, the district court ordered further evaluation of and planning for future desegregative actions that might assist in alleviating the remaining vestiges of the state-imposed St. Louis dual system. Subparagraphs (a), (b) and (c) of paragraph 12 of the district court's 21 May 1980 order constitute the principal features of the additional requirement. The district court also, by order of 3 June 1980, denied a motion by the Caldwell plaintiffs seeking leave to file a complaint against the United States to require the federal government to affirmatively assist desegregation of the St. Louis schools, primarily through the operation of federal housing programs. Further, the court later entered an order pertaining to the composition and functioning of the court appointed monitoring committee.

Four parties appealed. The State defendants appealed the finding of joint State liability, the requirement that the State fund one-half of actual desegregation expenditures, parts of the approved desegregation budget, and the additional desegregation requirements of paragraph 12 of the 21 May 1980 order.

The Adams plaintiffs (the white parent groups) also appealed, contending that the approved intradistrict plan was too extensive and based on erroneous data, that the

district court should have ordered interdistrict relief, that the approved plan's faculty desegregation provision was too strict, that the plan was unfair to white students, and that the court should have entered a financing order against the United States.

The Liddell plaintiffs' appeal presented a scattergun attack on the inadequacy of the approved desegregation plan and, inconsistently, contended that the provision for faculty racial balance was too strict.

The Caldwell plaintiffs' appeal was three-pronged. First, we challenged a single feature of the approved desegregation plan—the 50%-black ceiling imposed upon the level of desegregation to be accomplished. We argued that this limitation was impermissible under *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and that it was an unconstitutional racial ceiling. Second, we appealed from the district court's order denying leave to file a complaint against the United States. Third, we challenged the composition of the district court-appointed monitoring committee, as well as the district court's authorization for the chairperson of that committee to have *ex parte* contacts with the court.

Three parties were appellees and filed briefs as appellees, on appeal—the United States and the St. Louis Board in all respects, and the Caldwell plaintiffs as against the appeal of the State defendants and most aspects of the appeals of the Liddell and Adams plaintiffs. The Caldwell plaintiffs filed a full brief and presented oral argument in opposition to all issues presented on appeal by the State defendants to to most of the contentions of the Liddell and Adams plaintiffs.

The court of appeals issued its opinion on 13 February 1981, affirming all challenged aspects of the district court's

order, except that the Caldwell plaintiffs' challenge to the district court's order authorizing *ex parte* contacts between the monitoring committee and the court was sustained. The court thus rejected the State defendants' appeal in its entirety, with the result that the Caldwell plaintiffs, the St. Louis Board and the United States were completely successful on appeal as against the State defendants. The court also rejected the appeals of the Liddell and Adams plaintiffs in their entirety.

On the Caldwell plaintiffs' appeal, the court rejected, *sub silentio*, their single issue pertaining to the desegregation plan, i.e., the asserted unconstitutionality and impermissibility of the 50%-black ceiling employed in the approved plan.[3] With respect to the two minor issues pertaining to the court-appointed monitoring committee, the court of appeals upheld the composition of the committee but, as noted above, sustained the Caldwell plaintiffs' position about *ex parte* communications. As to the only other issue raised by the Caldwell plaintiffs—the district court's refusal to allow an amended complaint against the United States—the court of appeals found no abuse of discretion in light of the unique circumstances, especially the time constraints under which the district court was operating, but the court also clearly left the way open for the Caldwell plaintiffs to renew their claim against the United States.

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[3] The court of appeals declined to directly address the racial-ceiling issue. Instead, the court erroneously treated the Caldwell plaintiffs' position as being the same as that of the Liddell plaintiffs. See p. 13a, *infra*. (The court also erroneously implied that the Caldwell plaintiffs were among "[all] four of the appellants . . . arguing that the district court erred in failing to directly order [financing] relief against the United States government." Page 23a, *infra*. The Caldwell plaintiffs expressly did not seek a funding order against the United States on appeal, though we did seek the housing relief described in note 8 of the opinion below).

The court below concluded its opinion of 13 February as follows: "All parties will bear their own costs in this appeal." Evaluation of this disposition with respect to appellate costs led the Caldwell plaintiffs to petition for clarification or rehearing. In particular, the Caldwell plaintiffs were concerned, in view of the inconsistent and confusing past practices of the Eighth Circuit, that the court's ruling on appellate costs could conceivably be construed as encompassing attorneys' fees authorized by 42 U.S.C. §1988. Accordingly, we filed a timely petition for clarification or rehearing, which (in addition to another issue not relevant here) requested the court to further address the cost question, as follows:

> By clarifying that the Court's disposition with respect to costs on appeal is limited to those costs recoverable under FED. R. APP. P. 39, which does not encompass attorneys' fees, or, in the alternative, by granting rehearing and directing that costs on appeal, including attorneys' fees, be awarded against the State and St. Louis Board defendants in favor of the Caldwell plaintiffs-intervenors.

On 19 March 1981 the court entered an order denying the Caldwell plaintiffs' request for clarification or rehearing, stating as follows (p. 40a, *infra*):

> We decline to attempt to restate our original intentions concerning costs. Prior to the filing of this petition, the Caldwell plaintiffs made no application for attorneys' fees. We construe this petition, however, as a request for a ruling on whether they are entitled to attorneys' fees. We hold that they are not.

Reasons for Granting the Writ

Under the settled construction of 42 U.S.C. §1988 the Caldwell plaintiffs are entitled to recover attorneys' fees from the State defendants for appellate services, plaintiffs having wholly succeeded on appeal as appellees against the State defendants' appeal. Section 1988 also authorizes an award of fees against the St. Louis Board for appellate services since the Caldwell plaintiffs constitute previously-declared prevailing parties who pressed, in good faith and for good cause, albeit unsuccessfully, for more extensive intradistrict desegregation.

The Eighth Circuit nevertheless held, without articulating any reason, that plaintiffs were not entitled to fees under §1988. This result is in direct conflict with this Court's decision in *Northcross* v. *Bd. of Educ., of Memphis,* 412 U.S. 427 (1973). If the Eighth Circuit's unreasoned disposition is deemed to be based on the apparent view of that court that questions concerning fees for appellate services should be decided in the first instance by the courts of appeals, then the result below is direct conflict with the rule of *Perkins* v. *Standard Oil Co. of Calif.,* 399 U.S. 222 (1970), and with the decisions of every other circuit, holding that such questions ordinarily should be initially decided in the district courts. And, if the result below is a product of the view that fees for appellate services under §1988 are "costs" controlled by FED. R. APP. P. 39, then the Eighth Circuit's disposition is in conflict with the express holdings of other circuits, and with the clear implication of *Roadway Express, Inc.* v. *Piper,* 100 S. Ct. 2455 (1980).

Such plain conflict with the decisions of this Court and those of other courts of appeals fully warrants the exercise of this Court's certiorari jurisdiction for conflict-resolution purposes. Equally compelling is the need for

this Court to exercise its supervisory power to give direction to the Eighth Circuit as to its role under §1988 with respect to fees for appellate services.

1. *The Eighth Circuit's Denial of Fees, Without Articulation of Any Reasons, Conflicts With a Controlling Decision of This Court.*

There are occasions when the reasons underlying a court's denial of attorneys' fees are so apparent from the surrounding circumstances that a summary denial is appropriate. This is not such a case. The Caldwell plaintiffs have been declared to be the prevailing party to this litigation as to the liability of the State and St. Louis Board defendants for the St. Louis dual system. The legislative history of §1988 and the decisions of this Court hold that such plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust."[4] The court of appeals correctly adhered to this standard in its 1980 decision in *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 101 S.Ct. 88 (1980), when it held that the Caldwell plaintiffs were entitled to fees for all trial and appellate services rendered up to that time.

Having thus been declared the prevailing party on the liability phase of case, the legislative history of §1988 and the decisions of the lower courts (including the Eighth Circuit) also hold that "counsel for the prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter."[5] Even at the remedial stage of

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[4] *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); *Northcross* v. *Bd. of Educ., of Memphis*, 412 U.S. 427 (1973); *Christianburg Garment Co.*, v. *EEOC*, 434 U.S. 412 (1978).

[5] See, e.g., *Northcross* v. *Bd. of Educ. of Memphis*, 611 F.2d 624, 635-56 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Brown*

litigation, under this standard, a prevailing party is not to be denied fees merely because he "advocated a desegregation remedy of broader scope and faster pace than was ultimatly adopted. . . ." [6]

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v. *Bathke*, 588 F.2d 634 (8th Cir. 1978); *see also, Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981); *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980); *Seattle School Dist. No. 1* v. *State of Washington*, 633 F.2d 1338 (9th Cir. 1980); *Sherkow* v. *State of Wisconsin*, 630 F.2d 498 (7th Cir. 1980); *cf. Gluck* v. *American Protection Industries, Inc.*, 619 F.2d 30 (9th Cir. 1980).

[6] *Northcross* v. *Board of Educ. of Memphis, supra*, 611 F.2d at 636. The *Northcross* court explained in full (id.):

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to which the plaintiffs did not prevail, especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter. We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues." Furthermore, it would hardly further our mandate to use the "broadest and most flexible remedies available" to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith. The fact that these lawyers advocated a desegregation remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their

Here there is no apparent legitimate reason for denying fees to the Caldwell plaintiffs for services rendered in connection with the latest appeal. These plaintiffs were completely successful as against the State defendants; and though they did not succeed on one issue in dispute with the St. Louis Board (see pp. 8-9, *supra*), no party nor the court below has contended that the issue was manufactured, insubstantial, frivolous or litigated in bad faith. Yet the court of appeals, without stating any reason,[7] held that plaintiffs are not entitled to recover attorneys' fees for appellate services. This disposition is in conflict with *Northcross* v. *Bd. of Educ. of Memphis*, 412 U.S. 427 (1973), where, as here, the court found it "not possible for this Court to determine whether the court of appeals applied the proper standard in reaching this result." *Id.* at 427-28.[8]

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clients have prevailed; the Memphis school system is desegregated.

See also: *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974).

[7] The court's reference to the fact that "[p]rior to the filing of this petition, the Caldwell plaintiffs made no application for attorneys' fees" (p. 40a, *infra*), cannot pass for a reason. Despite the state of confusion in the Eighth Circuit (pp. 15-19, *infra*), that court has never held that fees for appellate services *must*, at the price of waiver, be requested either in the briefs on appeal or within the time limits of Fed.R.Civ.P. 39. If that were the unstated reason for the result below, it would constitute a denial of due process. (Indeed, as shown in reason 2, above, the law of the Eighth Circuit now, as established by its reported random and wildly divergent practices, is a denial of due process in practical consequence, calling for this Court's supervisory attention). The court did not tie its lack-of-prior application statement to the result it reached, however, and we have, therefore, presumed that the statement is merely an accurate description of procedural history, not an indefensible reason.

[8] The courts of appeals uniformly impose upon their district courts the requirement that fee denials be supported by reasons articulated on the record. See, e.g., *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496 (2d Cir. 1980); *Northcross*

This Court should therefore issue a writ of certiorari to bring the Eighth Circuit into line with this Court's rule against the summary denial of attorneys' fees in circumstances that do not make apparent the reason for denial. See *Consolidated Freightways Corp.* v. *Kassel*, 49 U.S.L.W. 3743 (U.S. April 6, 1981) (No. 79-1618), *granting cert. to* —— F.2d —— (8th Cir. 1980).[9]

2. *The Law of the Eighth Circuit Respecting Attorneys' Fees for Appellate Services Is in a State of Disarray and the Result in This Case Is in Irreconcilable Conflict With Applicable Decisions of This Court and Those in Other Circuits.*

Prior to their petition for clarification or rehearing, the Caldwell plaintiffs did not apply to the court of appeals for attorneys' fees for services rendered on this latest appeal, believing that the ordinary rule, especially applicable in ongoing litigation such as this, calls for such deci-

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v. *Board of Educ. of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Morrow* v. *Dillard*, 580 F.2d 1284 (5th Cir. 1978). Even the Eighth Circuit, in contrast to the standard it imposes upon itself, persistently demands such a standard of its subordinate courts. See, e.g., *Firefighters Institute for Racial Equality* v. *St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); *Greminger* v. *Seaborne*, 584 F.2d 275 (8th Cir. 1978).

[9] In *Consolidated Freightways Corp.* v. *Kassel*, No. 79-1618, this Court is reviewing another Eighth Circuit decision in which the issue presented for review is whether "a court, without articulating its rationale, [may] summarily deny an application for attorneys' fees under 42 U.S.C. §1988?" It is thus conceivable that the instant petition could ultimately be dispensed with by a summary vacation and remand following the decision in *Kassel*, or even prior to that time in view of the high degree of similarity between this case (in its present posture) and this Court's 1973 *Northcross* decision. For the reasons set forth in part 2, *infra*, we urge the Court to exercise its supervisory power to give the Eighth Circuit direction on fees for appellate services. If *Kassel* is not the right case, this case is well suited for that purpose.

sions to be made in the trial courts in the first instance. See *Perkins* v. *Standard Oil Co. of Calif.*, 399 U.S. 222, 223 (1970) ("The amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court. . . ."); *Northcross* v. *Bd. of Educ. of Memphis*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) ("the district court, with its greater facility for evidentiary hearings and fact-finding, should make awards for appellate services in the first instance . . . ."). As the Court of Appeals for the First Circuit held in *Souza* v. *Southworth*, 564 F.2d 609, 613-14 (1st Cir. 1977):

> The Supreme Court has recognized the power of a district court to award fees for appellate work under Section 4 of Clayton Act, *Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1970), and the Court of Appeals for the District of Columbia Circuit has argued that as a general rule a district court should in the first instance set the fee for services rendered on appeal. *Wilderness Society* v. *Morton*, 161 U.S. App. D.C. 446, 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd sub nom., Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Persuasive arguments support the position staked out in *Wilderness Society*. Although a court of appeals might be in the best position to assess the importance and complexity of a case on appeal and the quality of the performance by the attorneys that appear before it, factors going into a fee determination require factual findings more appropriately made by a district court. . . . As this case illustrates, a district court cannot fully evaluate such litigation without taking into account the history of the dispute on appeal. Having evaluated the appellate work of the attorneys, the district court properly may assign a price tag to it.

See also *Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286, 1300 (5th Cir. 1977).

Of course, there appears to be no doubt that a court of appeals has the power to award fees under §1988. See, e.g., *Hutto* v. *Finney*, 437 U.S. 678 (1978); *cf. Hanrahan* v. *Hampton*, 446 U.S. 719 (1980). Consequently, courts of appeals have sometimes awarded fees for appellate services in unique circumstances where fees could be awarded only for appellate work.[10] and even for the entire litigation where the fee awarded is the only remaining issue in the case.[11] But the usual and seemingly better practice, and the one directed by this Court in *Perkins* v. *Standard Oil Co. of California, supra*, is for such matters to be submitted to the trial courts for initial disposition.

Such was the approach contemplated here by plaintiffs, prior to the court of appeals' opinion of 13 February directing that each party bear its own costs on appeal. Had it been clear in the Eighth Circuit, as it seems to be elsewhere, that such cost dispositions do not encompass attorneys' fees, we would have accepted the court's cost directive, in this multi-party/multi-issue appeal, as an allowable exercise of the discretion authorized by FED. R. CIV. P. 39(a). This is because traditionally, the term "costs" as it appears in various rules and statutes has not encompassed counsel fees, and this traditional understanding has not been altered by 42 U.S.C. §1988, as amended in 1976,

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[10] See, e.g., *Vasquez* v. *Fleming*, 617 F.2d 334 (3rd Cir. 1980); *Davis* v. *Roadway Express, Inc.*, 590 F.2d 140 (5th Cir. 1979); *Moten* v. *Bricklayers, Masons and Plasterers International Union*, 543 F.2d 224 (D.C.Cir. 1976) [Title VII].

[11] See e.g., *Weisenberger* v. *Heucker*, 593 F.2d 49 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978); *Monroe* v. *County Board of Education of Madison County, Tennessee*, 583 F.2d 263 (6th Cir. 1978); *Rainey* v. *Jackson State College*, 551 F.2d 672 (5th Cir. 1977).

even though §1988 speaks of "a reasonable attorney's fee as part of the costs." See *Roadway Express, Inc.* v. *Piper*, 100 S.Ct. 2455 (1980). In fact, at least two courts of appeals have held that the "costs" recoverable under FED. R. APP. P. 39 do not include attorneys' fees authorized by 42 U.S.C. §1988. *Vasquez* v. *Fleming*, 617 F.2d 334 (3rd Cir. 1980); *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978).

In the Eighth Circuit, however, the practice governing awards of attorneys' fees is wholly unclear, if not totally confused. On occasion, that court has *sua sponte* awarded fees for appellate services, either by awarding a subjectively determined amount[12] or by directing the submission of time records, as it did in the previous appeal in this case.[13] In other cases in comparable circumstances the court's opinion have been silent on the question of fees for appellate services.[14] And in some instances as in *Crain* v. *City of Mountain Home*, 611 F.2d 726 (8th Cir. 1979), the court has treated appellate costs and attorneys' fees as a single item: "All costs, including an attorney's fee of $2,000 for services in this Court, shall be assessed against the appellees and cross-appellants." 611 F.2d at 730.

Given such decisional disarray, it is perhaps understandable why the court below in this case "decline(d) to attempt

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[12] E.g., *Campbell* v. *Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Crain* v. *City of Mountain Home*, 611 F.2d 726 (8th Cir. 1979); *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Brown* v. *Bathke*, 566 F.2d 588 (8th Cir. 1977) (*Bathke I*); *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977).

[13] *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied*, 101 S.Ct. 88 (1980) (fees awarded by unreported order of 28 April 1980). See also, e.g., *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977).

[14] E.g., *Reproductive Health Services* v. *Freeman*, 614 F.2d 585, 600 (8th Cir. 1980); *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978) (*Bathke II*).

to restate our original intentions concerning costs." Page 40a, *infra*. The need for this Court to exercise its supervisory power to straighten out this legal logjam, as well as to resolve the several decisional conflicts, is nonetheless thus apparent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: June 17, 1981

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APPENDIX

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1458

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington,

their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

No. 80-1494

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend,

and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

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Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellant.

No. 80-1531

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee

Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

No. 80-1599

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace

Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

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Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

No. 80-1735

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore;

Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Mal-

colm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: November 13, 1980

Filed: February 13, 1981

Before

HEANEY, BRIGHT and STEPHENSON,

Circuit Judges.

HEANEY, *Circuit Judge.*

We are asked by the State of Missouri and by three groups of parents to set aside the plan of the United States District Court for the Eastern District of Missouri for integrating the public schools of St. Louis. The State argues that it has been required to pay too much toward the integration plan and that it should not be ordered to participate in developing either a voluntary or an involuntary interdistrict integration program. The white parent group com-

plains that the district court's plan goes too far and is unfair to white students. The black parent groups assert that the plan doesn't go far enough in that it leaves some schools in North St. Louis all black. All of the appellants assert that the district court erred in failing to find that the United States contributed to the segregation of the St. Louis school district and to require it to pay a substantial portion of the cost of integrating the school system.

We affirm the decision of the district court. The desegregation plan was designed in accordance with the letter and spirit of the mandate of this Court and it meets constitutional requirements. If the plan is fully implemented in the same spirit and with the continuing cooperation of parents, students, teachers and community and religious leaders, a firm foundation will have been laid for affording the children of St. Louis a quality education in a racially neutral school system.

We take judicial notice of the fact that the Board of Education and one of the parent groups have filed amended complaints in the district court, asking the court to require inter-district integration with the schools of St. Louis, St. Charles and Jefferson Counties. We express no opinion as to the merits of the proposed amendments. We do, however, emphasize that the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration.

This case, filed in district court in 1972, is before this Court for the third time.[1] When it was first here, we remanded it with directions to permit the Caldwell parent

[1] For a detailed account of the procedural history of this case, *see Adams* v. *United States*, 620 F.2d 1277, 1281-1284 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

group to intervene as plaintiffs. *See Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977). When it was next here, we reversed the district court, concluding that the plaintiffs had clearly proven that the defendants had established and maintained a racially segregated school system in violation of the plaintiffs' constitutional rights. *See Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980). We remanded the case to the district court with the following admonition:

> Segregation in the elementary and secondary schools in St. Louis must now be eliminated. An integrated system must be devised and implemented promptly. In no other way can the constitutional right to an equal educational opportunity be assured to all children of St. Louis. With careful planning, expert advice, broad community participation and good faith, a plan to integrate the schools can be devised and implemented which will meet constitutional requirements.

Id. at 1291-1292.

Only one party—the Adams plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

On remand, the district court made every effort to comply with our charge. It established an interracial citizen's advisory committee to promote community involvement in the proceedings; it appointed Dr. Gary Allen Orfield to provide expert assistance in the preparation of a desegregation plan; it held extensive evidentiary hearings on proposed plans and the procedures involved in implementing them; and after a careful consideration of all the evidence, it approved a comprehensive desegregation plan to be effec-

tive at the start of the 1980-1981 school year. *See Liddell* v. *Board of Educ.*, 491 F.Supp. 351 (E.D. Mo. 1980).

II

The plan approved by the district court is a modified form of the "Orfield approach" sanctioned by this Court in the previous appeal. *See Adams* v. *United States, supra,* 620 F.2d at 1293-1296. The essential elements of the plan include (1) reassigning students to achieve the greatest possible number of desegregated schools (defined as 30-50% black); (2) establishing magnet and alternative schools designed to attract students of all races from throughout the St. Louis area; (3) organizing a middle school system to facilitate clustering, pairing and other integrative efforts; (4) instituting and expanding specialty and part-time integrated programs; (5) facilitating permissive integrative transfers; (6) initiating cooperative inter-district desegregation programs; (7) providing for integration of and special training for school personnel; and (8) developing a comprehensive community relations program.

Although the plan reflects the fact that it is not possible to fully integrate every school in the St. Louis system, the district court faithfully followed the directions of this Court by providing a variety of integrative experiences and enhanced educational opportunities for students remaining in predominantly black schools.

The district court estimated that the overall cost of the desegregation plan would be approximately $22.1 million. The court directed the State of Missouri to pay one-half of the actual cost of desegregation. To finance the remaining 50%, the court ordered the Board of Education to transfer approximately $4.7 million out of its debt retirement account, noting that federal funds would cover the balance.

Federal funding to assist in the integration process exceeded $7 million for the 1980-1981 school year.

III

Four parties—the Liddell plaintiffs, the Caldwell plaintiffs, the Adams plaintiffs, and the State of Missouri defendants[2]—appeal from the district court's order approving the desegregation plan. For convenience, the issues on appeal may be divided into two categories: those relating to the design of the plan and those relating to the financing of the plan. We first consider the challenges to the design of the plan.

A. *Design*

1. The Liddell and Caldwell plaintiffs contend that the plan approved by the district court is constitutionally deficient because it does not go far enough to remedy the effects of the defendants' discriminatory practices. Specifically, they argue that the district court erred in holding that schools with 30-50% black enrollments were to be considered integrated. Their position appears to be that the only constitutionally permissible means of integrating the St. Louis system was to reassign students so that each school had the same racial mix as the district as a whole—approximately 76% black and 24% white.

We cannot agree that the options available to the district court were so limited. In our decision of March 3, 1980, we

[2] The "State defendants" include the State of Missouri and its Board of Education, as well as the following Missouri officials: the Governor, the Attorney General, the Treasurer, the Commissioner of Education, the Commissioner of Administration, and the individual members of the Missouri Board of Education. Because their interests are identical and they have filed a joint brief, we refer to these parties collectively as the State of Missouri.

specifically stated that a plan similar to the one adopted by the district court would meet constitutional requirements. In so doing, we accepted the testimony of Dr. Orfield that such a plan would have the best chance of successfully integrating the St. Louis schools and stabilizing neighborhoods already integrated.

In affirming this aspect of the plan, we emphasize that students remaining in the predominantly black schools in St. Louis are not left completely untouched by the new system. Provisions affecting the remaining black schools include magnet and alternative programs, new and expanded specialty programs, permissive intra-district transfers, staff desegregation, staff development, a City/County integrated vocational program, and voluntary pupil exchanges with suburban school districts. We also emphasize that the plan requires the Board of Education to spend a substantial portion of the $22 million desegregation budget to improve the quality of education in those schools that remain all black and continuing expenditures are required for this purpose. Moreover, although a number of all-black or virtually all-black schools remain in St. Louis under the plan, the new system does eliminate the all-white schools from the district. Thus, although the degree of actual integration achieved under the plan is not optional, we reiterate our view that under all the circumstances, the plan is a constitutional one and has a better chance of providing a quality integrated education for the school children of St. Louis that any of the other plans that were presented by the parties to this lawsuit.[3]

[3] We note that the plan approved by the district court appears to permit up to a 15% deviation from the 30-50% black guidelines used to define integrated schools. In our view, a deviation of this magnitude should be permitted only rarely and then only after the court has determined, following a hearing in which the parties are

2. In contrast with the position of the Liddell and Caldwell plaintiffs, the Adams plaintiffs argue that the district court has gone too far in the intra-district pupil reassignment portion of its plan.[4] They note that the Court has included in the reassignment plan a number of schools that were between 30% and 50% black prior to desegregation. These schools, they contend, should not have been required to participate in the plan in view of this Court's determination that the boundary lines and assignment patterns for schools with 30-50% black enrollments should remain substantially changed.

This contention is without merit. Although reassignment does affect some schools that had a pre-plan enrollment of 30-50% black, we are satisfied that their inclusion does not violate our order of March 3, 1980. First, it turned out to be necessary to include some of these schools to accommodate the change from a two-tier (kindergarten-8; 9-12) to a three-tier (kindergarten-5; 6-8; 9-12) system, a change that was designed to help facilitate clustering and other integrative efforts and to improve the overall educational opportunities in St. Louis. Second, it appears from the record that many of the schools cited by the appellant as having a pre-plan black population of between 30 and 50% had such a racial mix because students were transported to them, not because the neighborhoods surrounding the schools were integrated. Still other schools were included

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given an opportunity to present their views, that allowing the variance will not impair the overall effectiveness of the desegregation plan.

[4] The Adams group also claims that the Board of Education relied on false enrollment and other data in developing the plan. Although there may be minor discrepancies in some of the figures, we find no support in the record for the appellants' position that the information relied upon was so inaccurate that the plan must be invalidated.

because their black enrollment percentage has increased rapidly in recent years, indicating that their black population would be likely to exceed 50% in the near future. When read in context, it is clear that our decision of March 3 was intended to minimize the transportation of students and to encourage the development and maintenance of integrated schools in integrated neighborhoods. In our view, the plan approved by the district court is faithful to this concept.

3. The State of Missouri is the sole challenger to paragraph 12 of the district court's order, which provides for various forms of inter-district relief. The State argues that the district court is without authority to order the preparation of any inter-district plan unless and until the suburban districts are joined as parties to the lawsuit. The Adams group, by contrast, argues that the court erred in not developing a more comprehensive inter-district remedy.

Paragraph 12 of the district court's order provides in part:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational and full programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F.Supp. at 353.

The appellees contend that this Court should not hear the State's challenge at this time because the directives contained in paragraph 12 are neither final judgments appealable under 28 U.S.C. § 1291 nor orders granting or denying injunctive relief appealable under 28 U.S.C. § 1292. Although the line between appealable and nonappealable orders is rarely clear in a case in which the district court retains jurisdiction over a developing desegregation plan, we are persuaded that we have jurisdiction over these issues in this appeal.[5] Accordingly, we consider the challenge to paragraph 12 on the merits, examining each section of the paragraph separately.

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[5] In support of their position that the provisions of paragraph 12 are nonappealable, the appellees cite to cases in which appeals courts ruled that orders directing school boards to formulate desegregation plans were nonappealable. *See Bradley* v. *Milliken*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972); *Taylor* v. *Board of Educ.*, 288 F.2d 600 (2d Cir. 1961). The State of Missouri distinguishes the cases cited by the appellees by noting that the school board in each of those cases was ordered to prepare

Section (a) of paragraph 12 directs the parties to "make every feasible effort" to work out a voluntary plan of inter-district pupil exchanges to be implemented in the 1980-1981 school year. Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up. Under the terms of the order, the plan is to be designed to "assist in alleviating the school segregation in the City of St. Louis [and to ensure] that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353. Thus, the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City.

Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." 491 F.Supp. at 358. Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit. We see no reason to prevent the opening of a consolidated integrated

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a remedy consistent with its judicially determined constitutional liability. Here, the State argues, the district court exceeded its jurisdiction by ordering the parties to prepare a plan involving other school districts, even though it is conceded that the suburban districts cannot be considered to be constitutional violators unless and until they are joined as parties to the litigation. While the question is not free from doubt, we are satisfied that we have jurisdiction to hear an appeal from a remedial order that, on its face, arguably involves potential parties who have not yet had their day in court.

vocational school at the beginning of the 1981-1982 school year.

Section (c) of paragraph 12 is also within the authority of the district court. By its terms, that section required the parties to develop and submit to the court by November 15, 1980, a "suggested" inter-district plan "to eradicate the remaining vestiges of government-imposed school segragation in the City of St. Louis and St. Louis County." We must read the term "government-imposed" to mean "found to be government-imposed by a court." Therefore, to the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be "government-imposed." But, to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so.

Furthermore, we recognize that the Board of Education and the Caldwell plaintiffs have petitioned the district court to amend their complaints to add as parties defendant the school districts in the three-county area surrounding the City of St. Louis. We express no opinion on the merits of those motions, but we emphasize that the current parties have a responsibility to comply with the terms of the district court order, including the provisions of paragraph 12, regardless of the disposition of the motions pending before the district court.[6]

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[6] We note that the district court has found it necessary to extend the deadlines for filing the proposed plans under paragraph 12(a)-(c) and that it is apparently having some difficulty in getting complete and adequate proposals from the parties. We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop

4. The Adams and the Liddell plaintiffs maintain that the district court erred in approving the personnel assignment portion of the desegregation plan. Both appellants oppose the court's adoption of a "Singleton" plan of personnel assignment, which provides that the black to white staff ratio in each school is to be substantially equal to the district-wide black to white staff ratio. They argue that the Singleton formula is inconsistent with the following directive of this Court: "The consent decree, insofar as it pertains to faculty integration, shall be fully implemented and additional steps taken to ensure that school personnel at every level will be integrated." *Adams* v. *United States, supra,* 620 F.2d at 1297. In our view, the plan approved by the district court goes beyond what we required, at least with respect to classroom teachers. We will not quarrel with that decision.

The Liddell and Adams groups argue that the personnel integration provision of the plan is inadequate because it fails to integrate the administrative staff. The district court's order provided that a Singleton assignment formula should apply to "[a]ll principals, teachers, and other certified staff who work directly with children at a school." 491 F.2d at 354. The court also stated, "The same criteria shall apply to non-certificated personnel." *Id.* We read these statements to provide that the Singleton assignment scheme is to apply to *all* principals, *all* teachers, and *all* non-certificated personnel, as well as to certificated staff members who work directly with children. It appears that nothing is said about administrators other than principals. That is not surprising, inasmuch as the Singleton approach matches

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and implement the plans contemplated by paragraph 12. It is imperative that the district court countenance no excuse for further delay.

district-wide race ratios with staff ratios at each school. There is no way, therefore, to apply that formula directly to administrators who are not assigned to specific schools. We assume that as to such personnel, the prior directive of this Court will be followed, and are confident that if that phase of the plan has not yet been implemented, it will be by the opening of the 1981-1982 school year.

5. The Adams and Liddel plaintiffs also join in challenging the manner in which the burdens of desegregation are distributed among the students. The Adams group contends that the burdens are borne disproportionately by the white students, while the Liddell group asserts that the black students suffer the greatest adverse effects under the plan.

We find no support in the record for either of these positions. The Adams appellants base their argument on the fact that slightly over one-half of the students transported to schools out of their neighborhoods are white even though white students comprise only 24% of the school population. In our view, that is not sufficient to show that the white students bear a disproportionate burden. In a situation such as that in St. Louis, where it is necessary to exchange black students with white students in order to integrate the schools, the number of whites who are transported will almost necessarily be approximately equal to the number of blacks who are similarly transported. Under these circumstances, the percentage of each race transported is not controlling.

The Adams group also argues that the black students reap a disproportionate amount of the benefits from the plan. That assertion simply has no support in the record.

The basis of the Liddell group's challenge is essentially that some black children remain in predominately black

schools under the plan.[7] We have answered that complaint earlier in this opinion.

6. The Caldwell group raised two issues concerning the composition and operation of the citizens' committees appointed by the district court. In our March 3 opinion, we stated,

> The Board of Education is to be given the principal responsibility for developing and implementing a comprehensive plan to integrate the school system. In fulfilling this responsibility, the Board shall work with the parties of this lawsuit, a broadly based interracial committee to be named by the district court and an expert, or experts, to be named by the district court.

Adams v. *United States, supra,* 620 F.2d at 1295 (footnote omitted).

In accordance with this directive, the district court appointed a twenty-member bi-racial "Citizens' Committee" to assist the Board of Education in developing the desegregation plan. The members of the Citizens' Committee were chosen from lists provided by the parties; four of the twenty members were selected from the list submitted by the Caldwell plaintiffs. Following approval of the plan, the court disbanded the Citizens' Committee and adopted a new "Desegregation Monitoring and Advisory Committee." The new group was composed of twelve members, one-half of whom were members of the original Citizens' Committee.

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[7] The Liddell plaintiffs also assert that the district court violated this Court's mandate by failing to establish an educational park in the City of St. Louis. In our March 3 opinion, we did refer to an educational park as one possible method of providing enhanced educational opportunities for St. Louis students. We did not, however, require the district court to establish such a park.

The Caldwell plaintiffs assert that they are not adequately represented on this new committee. The record shows, however, that two of the twelve Monitoring Committee members, including the vice chairperson, were originally nominated for the Citizens' Committee by the C aldwell group. It also shows that six of the twelve members on the Monitoring Committee are black. In light of these facts, no abuse of discretion has been demonstrated.

The Caldwell appellants' second objection to the Monitoring Committee is that the district court erred in expressly authorizing *ex parte*, oral communication between the Monitoring Committee chairperson and vice chairperson. We agree that all parties are entitled to know of the advice given the court by the Committee. *See Bradley* v. *Milliken*, 620 F.2d 1143, 1156-1158 (6th Cir.), *cert. denied*, 101 S.Ct. 207, 66 L.Ed.2d 80 (1980). Th best practice would be to reduce to writing all communications between the court and the Committee, make them part of the record, and provide them to counsel for the parties. If oral contact is deemed necessary by the district court, the parties should, where possible, be given notice and opportunity to be present when the oral report is received. To this point, however, no prejudice has been shown from any alleged *ex parte* contacts.

B. *Financing*

1. All four of the appellants join in mounting the primary challenge to the financing of the desegregation plan, arguing that the district court erred in failing to directly order relief against the United States government.[8]

[8] The claims of the Caldwell appellants go beyond the financial liability of the United States. They maintain that the government should be required to take affirmative steps to reverse the dis-

In support of their position, the appellants point to evidence in the record, as well as to statements of the district court and this Court, indicating that the policies and practices of the federal government have been a significant cause of segregation in the St. Louis school system. The fact remains, however, that no party has named the United States as a defendant and alleged that it engaged in discriminatory practices.[9] The real question, therefore, is whether the district court abused its discretion in refusing to grant the Caldwell plaintiffs' motion to amend its complaint to seek relief against the United States.

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criminatory effects of federal housing and other policies. This issue has not been tried in this lawsuit. Accordingly, the district court did not err in refusing to grant affirmative relief against the United States.

We note in passing that the district court has taken steps to ensure that federally assisted housing programs are operated so as to aid in the implementation of school desegregation in St. Louis. In paragraph 12(d) of its order, the district court directed the State defendants, the United States and the St. Louis Board of Education

> [t]o develop and submit to the Court by November 1, 1980, in conjunction with the Community Development Agency of the City of St. Louis, a suggested plan for insuring that the operation of federally-assisted housing programs in the St. Louis metropolitan area will facilitate the school desegregation ordered herein.

491 F.Supp. at 354.

No party has challenged this aspect of the district court's order. The parties have submitted plans in accordance with the order, and we approve of this effort to facilitate implementation of the overall desegregation plan.

[9] The Adams plaintiffs did name the United States as a defendant in its complaint in intervention. Rather than complain of the government's segregative acts, however, the Adams group alleged that the United States illegally required the St. Louis school district to take steps to desegregate the schools as a condition to release of federal funds for the district.

Under all the circumstances of this case, we find no abuse of discretion. The Caldwell plaintiffs' motion to amend was filed on May 23, 1980, one week after the district court concluded evidentiary hearings on the proposed desegregation plans. At that time, the district court was operating under a stringent time schedule, mandated by this Court, requiring that the plan be implemented by the beginning of the 1980-1981 school year. Given this need to expedite approval and implementation of the plan and the likely delay attendant in adding new theories of liability against a new defendant, we hold that the district court did not abuse its discretion in refusing to grant the Caldwell group's motion to amend at that time.

In affirming the district court's refusal to grant relief against the United States, we are mindful of the significant financial role played by the federal government in implementing the St. Louis desegregation plan. In its order approving the plan, the district court expressly recognized that a substantial portion of the funding for integration would come from the United States government. The court directed the United States Department of Education to expedite the processing of funding applications for St. Louis under the Emergency School Aid Act (ESAA), 20 U.S.C. § 3191 *et seq.* Apparently, this direction was heeded since the St. Louis school system received over $7 million in ESAA funds—nearly one-third of the desegregation budget—to cover the costs of implementing the plan during the 1980-1981 school year. Moreover, the evidence in the record gives us no reason to believe that similar funding will not be available to continue implementation of the plan for the foreseeable future. Under these circumstances, we are unwilling to hold that the district court erred by failing to expressly order the United States to pay for part of the desegregation plan.

2. The State of Missouri vigorously contends that it should have no part in paying for the costs of integration because its actions did not violate the Constitution. More precisely, the State argues that this Court did not overrule the district court's earlier finding of non-liability on the part of the State. Thus, the State asserts, the district court was precluded on remand from finding the State to be a constitutional violator.

This contention is wholly without merit. In our March 3 opinion, we specifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams* v. *United States, supra*, 620 F.2d at 1295 n.28. These statements amount to a clear reversal of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so.

3. As an alternative argument, the State contends that, even if it was proper to require it to fund part of the plan, it has been ordered to pay too great a share. The State maintains that the amount it has been ordered to pay is not commensurate with the degree of its constitutional violation. In addition, it argues that the desegregation plan budget is inflated and that the State's portion of the funding is too great as a result. We agree with neither contention.

After reviewing the discriminatory action and inaction of the State of Missouri, the district court concluded that

"the State defendants stand before this Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty." 491 F.Supp. at 359. This conclusion has ample support in the record; as noted, we recognized as much in the prior appeal. It was well within the discretion of the district court, therefore, to order the State to pay one-half of the costs of integrating the St. Louis school system.

The State's complaints about the desegregation plan budget are that it includes items that are not properly considered part of the integration process and that certain savings were not taken into account. We need not review the specific items in the plan budget, however, because it is clear that the approved budget is only an estimate of the expected costs of implementing the plan. The district court's order requires the State to pay one-half of the *actual* costs of implementing the desegregation plan; the budget is used only to set a ceiling on the amount of the State's participation. In addition, the district court specifically directed that "continued efforts be made to reduce the actual costs of implementation." 491 F.Supp. at 352.[10]

4. The Adams' plaintiffs contend that the district court erred in directing the Board of Education to transfer approximately $4.6 million in excess funds from its debt retirement account to be used to make the building modifications necessitated by the desegregation plan. This complaint is based on the assertion that the Board of Education was

[10] Like the State of Missouri, the Adams appellants contest the validity of the budget on the ground that it includes items not necessary for integration. Inexplicably, the Adams group also takes the seemingly inconsistent position that the amount allocated by the budget is insufficient to desegregate the St. Louis schools. For the reasons stated in the text, we need not decide the validity of these challenges to the budget.

without authority under Missouri law to collect surplus funds in the account reserved for the retirement of bonds. The Board of Education responds that the money in the debt retirement account was collected in accordance with statutory guidelines following annual public hearings, and that no one has complained of the accumulated surplus prior to this time.

We decline to rule on whether Missouri law authorized the Board of Education to accumulate funds in its debt retirement account. This is surely not the most suitable forum for determining the propriety of the Board of Education's bond issues. We are satisfied that the district court had discretion to order the transfer of funds already collected and held by the Board.

To summarize, we affirm the judgment of the district court and commend it for the manner and promptness with which it implemented the earlier decision of this Court. We remand the matter to the district court with directions to continue with the implementation of its plan in accordance with the slight modifications made by this opinion. All parties will bear their own costs in this appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1458

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace

Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

No. 80-1494

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise

Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Order of United States Court of Appeals

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellant.

No. 80-1531

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee

Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

Order of United States Court of Appeals

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

No. 80-1599

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace

Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

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Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

No. 80-1735

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore;

Order of United States Court of Appeals

Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

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Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Mal-

colm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Filed: March 19, 1981

Before

HEANEY, BRIGHT and STEPHENSON,

Circuit Judges.

ORDER

This Court has before it a number of motions relating to the above entitled case.

I

The motion of the Special School District of St. Louis County, Missouri, to intervene on appeal for the purpose of filing a petition for rehearing or rehearing en banc is granted. The petition for rehearing or rehearing en banc is denied, the latter by a unanimous vote of the Court.

Order of United States Court of Appeals

The Special School District asks us to review our decision of February 13, 1981, asserting that the decision is inconsistent with an August 15, 1980, order of this Court which denied the Special District's petition for a writ of prohibition.

We do not agree. The primary issue addressed by this Court in its August 15 ruling was whether the Special District would be provided with a full and fair opportunity to present its views to the district court prior to being ordered to remedy its constitutional violations, if any.

The district court correctly perceived the thrust of our August 15 ruling. In a December 19, 1980, order denying the Special District's motion to disqualify him from further proceedings in the case, Judge Meredith declared, "The Special District can rest assured that before any action is taken that would affect it, it will have ample opportunity to be heard." Similarly, in an order dated March 4, 1981, Judge Hungate reiterated the view that voluntary cooperative efforts with the School District of the City of St. Louis would result in no prejudice to the legal rights of the Special District:

> This Court emphasizes that a 12(b) *plan* has merely been filed with the Court as required by Judge Meredith's order of May 21, 1980. No action has or will be taken until a hearing has been held during which the [Special District] will have ample opportunity to be heard. [Emphasis included.]

Judge Hungate has now set May 11, 1981, as the hearing date for questions involving the Special District, and he has established a discovery and briefing schedule designed to facilitate resolution of the issues and provide the parties with full opportunity to be heard. We express no

opinion as to the merits of the issues to be heard by Judge Hungate.

II

The Caldwell plaintiffs petition this Court for rehearing, modification and/or clarification of this Court's decision of February 13, 1981. They ask this Court to modify its February 13, 1981, opinion "to reflect the fact that paragraph 12(c) of Judge Meredith's order of 21 May 1980 was amended by him on 17 September 1980, and that proceedings now pending in the district court may moot the controversy over paragraph 12(c)."

In subdivision III of this order, we have denied the State of Missouri's motion for a stay of mandate or stay of enforcement of the district court's paragraph 12 orders. In that subdivision, we acknowledge the amendments made by the district court; we see no need to further modify our opinion of February 13, 1981. There is nothing inconsistent about paragraphs 12(a) and 12(c), and both are valid parts of the district court's order. We additionally acknowledge the protective orders entered by Judge Meredith on June 17, 1980, and October 6, 1980, were extended by Judge Hungate on March 4, 1981, and note our concurrence therewith.[1]

The Caldwell plaintiffs also ask this Court to clarify its decision on the allocation of costs on appeal or, in the alternative, to grant a rehearing and direct that "the costs on appeal, including attorneys' fees, be awarded against the State and St. Louis Board defendants in their favor.

[1] In essence, these protective orders provide that any form of voluntary cooperation by the parties or County school districts will not be used as evidence in pending district court proceedings or otherwise prejudice the legal rights of any party or County school district to resist judicial imposition of compulsory interdistrict remedy.

We decline to attempt to restate our original intentions concerning costs. Prior to the filing of this petition, the Caldwell plaintiffs made no application for attorneys' fees. We construe this petition, however, as a request for a ruling on whether they are entitled to attorneys' fees. We hold that they are not.

III

On February 19, 1981, the State of Missouri[2] filed a motion requesting this Court to "stay the issuance of its mandate * * * as well as the enforcement of paragraphs 12(a), (b), and (c) of the May 21, 1980 Order of the District Court * * *, including the [district court's December 19, 1980,] supplementary order pertaining thereto * * *," pending the filing of a petition for a writ of certiorari in the United States Supreme Court. *See* Fed.R.App.P. 41(b). We deny the motion to stay our mandate or to stay enforcement of the district court's orders and adhere to our most recent pronouncement concerning the State's legal responsibilities for the prompt desegregation of the St. Louis public school system. *See Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 17-20, 27-29 (8th Cir. Feb. 13, 1981).

On March 3, 1980, this Court reversed the district court's determination that the various defendants in this litigation committed no constitutional violations in the formation and perpetuation of the admittedly segregated St. Louis public school system. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88 (1980). At that time, we specifically noted that the State of Mis-

[2] For a complete listing of the state defendant-appellants in this litigation, *see Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 13 n.2 (8th Cir. Feb. 13, 1981).

souri, the Missouri Commissioner of Education and the Missouri Board of Education were added as defendants pursuant to various district court orders in the summer of 1977. *Id.* at 1283. Moreover, we recognized that actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area. *Id.* at 1291, 1294 n.27. The state defendant-appellants did not seek Supreme Court review of our Adams' decision.[3]

We remanded the case for further district court proceedings. Upon remand, the district court held that the State defendants are "primarily constitutional wrongdoers who have abdicated their affirmative remedial duty" concerning the segregated St. Louis public school system. *Liddell* v. *Board of Educ.*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). On February 13, 1981, we affirmed that determination and endorsed the desegregation plan adopted by the district court, including the provisions of paragraph 12. *Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 28-29 (8th Cir. Feb. 13, 1981).[4]

The district court amended paragraph 12 on September 17, 1980, and December 19, 1980. Unfortunately, these amendments were not included in the record submitted to this Court prior to our February 13, 1981, decision. Therefore, our February 13, 1981, decision does not discuss the district court's two amended orders. We are convinced, however, that these amendments do not alter the substance of original paragraph 12. Accordingly, we find it unnecessary to amend our February 13, 1981, decision to reflect

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[3] Only one party—the Adams' plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

[4] We also affirmed the district court's determination that the State of Missouri must pay one-half of the actual costs of implementing a constitutionally required desegregation plan for the St. Louis public school system.

the district court's September 17, 1980, and December 19, 1980, amendments. As amended, paragraphs 12(a)-(c) provide:[5]

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by *December 15, 1980.*
>
> *The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer nad more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures nad prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating*

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[5] We note that the State of Missouri has filed a notice of appeal from the December 19, 1980, order of the district court. While we express no opinion on the merits of that appeal, we emphasize that its pendency does not relieve the parties of their responsibility to fully follow the orders of the district court.

In the quotation in the text, the amendments to paragraph 12 made by the September 17, 1980, order of the district court are indicated in italics. The amendments made by the December 19, 1980, order are underlined.

Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or before February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St.

Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by *December 15, 1980,* a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including rea-

sonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that the provisions of paragraph 12, both as originally written and as amended, must be enforced. The State's motion does not raise any new issues. Indeed, we previously considered and rejected the very concerns presented in its stay motion. *See Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 19-20 (8th Cir. Feb. 13, 1981). In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations. *Id.* at 20. Paragraphs 12(a)-(c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.

The State of Missouri's motion is denied. We order prompt implementation of our mandate in *Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir. Feb. 13, 1981).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Office-Supreme Court, U.S.
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No. 81-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARLINE CALDWELL, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

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No. 81-16

IN THE

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OCTOBER TERM, 1981

EARLINE CALDWELL, *et al.*,
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v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

Petitioners, Caldwell, *et al.*, plaintiffs-intervenors have asked this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 13, 1981, *Liddell, et al.*, v. *Board of Education of the City of St. Louis, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735. Petitioners' Appendix ("Pet. A.") - 1. The petition for rehearing was denied by the appellate court on March 19, 1981.

Respondents, the Board of Education, its members, officers and top administrators ("City Board") urge this Court to deny the present Petition.

STATEMENT OF THE CASE

This case was instituted in February, 1972, by a group of black parents, Liddell, against the City Board. The charges were racial discrimination in the public schools in violation of the Fourteenth Amendment.

During the nine years of this litigation six parties were added to the original ones: the Petitioners (black parents and the NAACP), the United States, the State of Missouri (and some of its top officials), the City of St. Louis and Adams (white parents). *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976) *cert. denied*, 433 U.S. 914 (1977).

In 1979 the trial court rendered its judgment in favor of the defendant City Board, but this was overturned by the Eighth Circuit en banc on March 3, 1980, *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980) *cert. denied*, 101 S.Ct. 88 (1980). The court ordered that the City Board prepare a desegregation plan within the guidelines which were set forth in the opinion.

On the subject of costs and fees, the appellate court ruled that the Adams group was not entitled to a fee, but the Liddell group and Caldwell could be, with the following directions:

> "On remand, the district court shall determine reasonable attorneys' fees for the Liddell group (and for the Caldwell group, if they requested them) in accordance with the general principles set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)." (620 F.2d at 1297)

Different directions were given about the determination of fees for appellate services:

> "The appellants requesting attorneys' fees on appeal shall submit a motion to that effect within thirty days of the filing of this opinion. Documentation of their claims shall be included." *(id.* at 1297)

On March 30, 1980, Caldwell filed their Motion for fees for their appellate services, supported by the affidavits of their two principal lawyers, and aggregating twenty-five pages (copy attached as Appendix 1). No objection or question is made anywhere in this Motion or supporting material to the fact that the determination of the fee was to be made by the Eighth Circuit rather than in the District Court.

By Order dated April 28, 1980,[1] the seven judges of the appellate court made the following allowances (copy of the Order is attached as Appendix 2):

Hours claimed	Fees requested		Fees allowed
291.00	Liddell	$27,645.00	$ 6,000.00
394.25	Caldwell	$50,205.00	$18,000.00

On remand, following a hearing, the district court entered its order on May 21, 1980, approving the City Board's desegregation plan, holding the State defendants to be "primary constitutional wrongdoers", directing the preparation of a voluntary desegregative plan in cooperation with the suburban districts and suggesting other remedies, *Liddell* v. *St. Louis Board of Education*, 491 F.Supp. 351 (E.D. Mo. 1980).

Four appeals were taken from that Order: the State appealed *inter alia* from the finding of liability and the resulting requirement to pay for one-half of the desegregation expenditures; Adams appealed *inter alia* on the ground that the approved intradistrict plan was too broad, and that the faculty and white students provisions were too strict; and Liddell challenged the plan as inadequate. Caldwell, as stated in their Petition here (p. 8), pressed a three-pronged appeal. First was the challenge of the 50% ceiling placed by the Order upon the level of the black

[1] The date of April *18*, 1980 given in the Petition at 6 is obviously a typographical error.

enrollment in integrated schools (this yardstick was included in the Desegregation Plan, pursuant to the testimony of the government expert Gary Orfield, and was directed to provide some stability in the integration process).[2] Second was the challenge to the district court's denial of leave to file a complaint against the United States. Third was the challenge of the composition of the monitoring committee, and of ex parte communications between the chairman of the committee and the court.

Appellees' briefs were presented by the United States, the City Board and Caldwell opposing the appeals of the State and certain aspects of the appeals of Adams and Liddell.

In its Order of February 13, 1981 in *Liddell* v. *Board of Education of the City of St. Louis, supra,* Pet. App.-1 *et seq.* the Eighth Circuit overruled the contentions of the State, Adams, Liddell and also, but for one item, all the contentions of Caldwell. The limited exception concerns one of the "two minor issues" raised in what Petitioners have defined as the "third" prong of their appeal (Petition, pp. 8-9). Thus, the only success of Caldwell is in one minor issue out of the two which Petitioners admit to represent the least important prong in their appeal.

After reviewing the merits of the issues presented and ruling thereon, the appellate court added that "All parties will bear their own costs in this appeal" (Pet. Appendix, p. 28a). Petitioners moved for clarification or rehearing on the question of their fees, and prayed for an order that costs and attorneys' fees be awarded against the State and the City Board in Petitioners' favor.

In an unreported order entered on March 19, 1981 the Eighth Circuit denied the motion and specifically held that Petitioners were not entitled to attorneys' fees (Pet. App. 39a-40a).

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[2] The 30% to 50% range of black enrollment had been approved by the Eighth Circuit in the prior appeal. *Adams* v. *United States, supra,* 620 F.2d at 1296.

SUMMARY OF ARGUMENT

No real conflict exists between the decision below and decisions of this Court or of other circuits. In its orders of February 13, 1980 and March 19, 1980, the Eighth Circuit has denied Petitioners' application for fees for their appellate services. The ground for this decision is clearly found in the Court's review of the record which discloses that Petitioners are not "the prevailing party". Hence the statutory prerequisite - that the appellant be the prevailing party - is not present and therefore the statutory fee cannot be allowed. Of the broad scope of the three-pronged appeal of Petitioners it is admitted they lost everything but a minor subpoint of the last and least important prong. Hence, Petitioners' cases as *Northcross* involving, as they do, prevailing parties (Petition, pp. 12-13) are inapposite here, and cannot serve as the basis for a conflict warranting consideration by this Court.

Petitioners' contention that a conflict exists between the ruling of the Eighth Circuit in the present case and the Sixth Circuit in the 1979 *Memphis* case is not meritorious. No conflict exists for the reason that Caldwell lost in the appeal under consideration here, whereas in the *Memphis* case plaintiffs won. The issue of failure to articulate the reasons for the denial of a fee award is mooted by Petitioners' concession that a summary denial, without articulating reasons, is appropriate when the reasons are apparent.

The contention that the appellate decision should have ordered a remand to the district court on the fee question does not rise to the level of a conflict with this Court or with other circuits. Even the Petitioners enjoyed the benefit of a direct and more expeditious one-tier determination of their fee by the Eighth Circuit in the April 28, 1980 ruling (App. 2). It is admitted that no rule of general applicability would apply. Hence the issue is one of evaluating the particular facts concerning the appeal. No conflict or other grounds are presented to warrant the intervention of this Court on writ of certiorari.

REASONS FOR DENYING THE WRIT

1. Petitioners contend that they are "the prevailing party" as to the issue of the liability phase of the case and that such status should continue to be recognized and rewarded *ad infinitum.* Caldwell's appellate services in *Adams* v. *United States,* 620 F.2d 1277 (8th Cir. 1980) were terminated with the decision of March 3, 1980. The subsequent fee proceedings, summarized *supra,* were fully concluded and the fee paid and accepted.

The situation in *Liddell* v. *Board of Education, supra,* decided on February 13, 1981, was radically different. *Caldwell* does not even claim that they were successful against the City Board on any of the major issues raised in their appeal, all of which were won by the City Board.

Using Petitioners' own classification of the issues raised in their appeal (Statement of the Case, *supra,* p. 4) they sustained two major failures, while the "minor" gain they realized was offset by "minor" loss, which is likewise admitted here.

By way of contrast, Petitioners' statement with regard to the State defendants asserts without any qualification or limitation:

> "These plaintiffs were completely successful as against the state defendants" (Brief, p. 14).

The juxtaposition between Petitioners' record of success (vs. State) and failure (vs. City Board) is conclusively shown in Petitioners' own words and the facts of the case.

The applicability of the statute is triggered by the determination of the party which prevails. By no stretch of the imagination could Caldwell, who lost on racial balance, on bringing a new action against the United States and on the composition of the monitoring committee, and who won only the narrow and concededly minor point that the chairman of the monitoring committee could not address the judge *ex parte,* be deemed to be the prevailing party on these appeals.

Hence the alleged conflict between the Eighth Circuit in *Liddell* and the Sixth in *Northcross* v. *Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980) and similar cases cited in the Petition, pp. 12-13, is non-existant. The legal posture and the facts of these cases are different and have no relevance here.

None of these cases held or requested that attorneys' fees should be allowed to a losing party. Indeed in one of the phases of the *Northcross* case in which the plaintiffs-appellants were not successful, 489 F.2d 15 (6th Cir. 1973), *cert. denied* 40 L.Ed.2d 313 (1974) it was stated in their 1978 brief:

> "Plaintiffs made and make no claim for expenses and legal services incurred in connection with the above-described appeals... ." *(Northcross,* Nos. 78-1289, -1290, -1291, p. 39, ftn. 17)

In the Fifth Circuit case of *Universal Amusement Co.* v. *Vance,* 559 F.2d 1286, 1300, (5th Cir. 1977 relied upon in the Petition, p. 17) the court was asked to remand the determination of attorneys' fees for two parties. The court remanded one, and disposed of the other saying: "King Arts has not prevailed and is, of course, not entitled to such relief."

2. Petitioners' claim that by holding, without stating the reasons, that Caldwell was not entitled to fees under 42 U.S.C. 1988, the Eighth Circuit "is in direct conflict with this Court's decision in *Northcross* v. *Board of Education of Memphis,* 412 U.S. 427 (1973)" (Pet. at 11). In the *Northcross* case plaintiffs had won on the issues on appeal of the desegregation plan and further desegregation. Nevertheless, the Sixth Circuit denied the fee motion without any determination of the reasons for the denial. This Court reversed and remanded, setting forth the

standard to be followed by the Sixth Circuit.[3] This Court reviewed the pertinent statutory provisions and noted that the allowance of reasonable attorneys' fees under the Civil Rights Act may be made to the "prevailing party" and that under a similar statute attorneys' fees may be awarded "to one who succeeds in obtaining an injunction" (412 U.S. at 428).

No conflict exists with the Eighth Circuit decision for the conclusive reason that Caldwell lost in their appeal from the May 21, 1980 Order in the *Liddell* case and are not entitled to any recovery from the winning City Board, whereas Northcross won in the Memphis case.[4]

Secondly, Petitioner admits that:

> "There are occasions when the reasons underlying a court's denial of attorneys' fees are so apparent from the surrounding circumstances that a summary denial is appropriate." (Petition, p. 12)

This is the situation present here. Petitioners were not the prevailing party at least as to the City Board. The City Board was. Thus Sec. 1988 cannot justify a fee award to Caldwell, as the losing party in this case.

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[3] This was the first case under the Emergency School Aid Act of 1970, 20 U.S.C. 1617 to reach this Court on the attorneys' fees. Silence about the reason in the appellate court's opinion, *supra,* allowed a question as to which standard may have been applied by the Sixth Circuit. No such problem is present here, since the Eighth Circuit has followed the same standard as adopted by this Court since *Wharton* v. *Knefel,* 562 F.2d 550, 557 (8th Cir. 1977).

[4] Northcross' own evaluation leaves no doubt that a complete victory was achieved:

> "plaintiffs prevailed, lock, stock and barrel, in this Court on the Board's appeal...and plaintiffs also completely prevailed on their cross-appeal contentions..." (Brief for Plaintiffs-Appellants, Cause Nos. 78-1289, -1290, -1291, in the 6th Circuit, p. 70).

Caldwell refers also to *Consolidated Freightways Corp.* v. *Kassel,* 49 U.S.L.W. 3743 (U.S. April 6, 1981) (No. 79-1618), *granting certiorari* to - F.2d - (8th Cir. 1980). There the fee application was denied to a plaintiff who - unlike Caldwell - had been successful in the district court, appellate court and this Court. Another distinction between the *Kassel* and the *Liddell* cases is that while the law issue and determinative facts are simple and clear in the *Liddell* case, they show that many possible grounds for the denial of the fee motion have been submitted in *Kassel.*[3]

Also in *Kassel* no briefs were filed in the 8th Circuit concerning fees prior to the original denial, thus depriving the parties of the normal avenue to interpret the ruling. In the pending case, motions and arguments were exchanged as to whether fees should be awarded to Caldwell. The issues were clear. Neither the statute nor other principles of law allow a fee award to a party which lost.

3. Petitioners' contention that the Court of Appeals should defer to the district court the determination of whether attorneys fees have been earned for services on appeal and that failure to comply with the requirement invalidates the determination of that court, with a resulting conflict between the Eighth Circuit and this Court, is incorrect. In the first place, Petitioners admit that "Of course, there appears to be no doubt that a court of appeals has the power to award fees under #1988" (Pet. 17). This conclusion is fully supported by the authorities: *Hutto* v. *Finney,* 437 U.S. 678, 693 (1978); *Hanrahan* v. *Hampton,* 446 U.S. 719, 756 (1980); *Moten* v. *Bricklayers, Masons and Plasterers,* 543 F.2d 224, 240 (D.C. Cir. 1976)

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[3]See Brief of Petitioner in the *Kassel* case, pp. 6-7, listing ten possible grounds for such denial.

Secondly, Petitioners themselves have taken advantage of a direct fee determination by the Eighth Circuit in a prior phase of this same case, only a few months ago (*supra*, p. 3 and Appendix 2). No complaint was registered from Petitioners, no reservations entered of record, no objections were filed against the procedure or the substance, even though the result was about 36% below their prayer. Petitioners are precluded from raising this issue now.

Petitioners rely on *Perkins* v. *Standard Oil Co. of Calif.*, 399 U.S. 222 (1970) as supportive of their position. The very quotation of that case which is made by Petitioners shows that *Perkins* is addressed to the amount of a fee for which fact-finding and evidentiary hearings by the trial court may be needed, rather than the legal determination as to whether any fee is due to the applicant. To the same effect are *Northcross* v. *Board of Education of Memphis*, 611 F.2d 624, 637 (6th Cir. 1979) *cert. denied*, 447 U.S. 911 (1980),[4] and the other cases cited by Petitioners.

These cases only stand for the proposition that when a party is entitled to fees for appellate work, the *amount* should generally be determined first in the district court. The cases do not stand for the proposition that the question of entitlement to fees should ordinarily be decided in the district court. Indeed, the *Vance* case, cited by Petitioners, *supra*, shows that no district court action is required when the applicant is not the prevailing party and therefore - as Caldwell here - not entitled to any fee award.

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[4]The quotation used by Caldwell is as follows:

> "the district court, with its greater facility for evidentiary hearings and fact-finding, should make awards for appellate services in the first instance... ." (Brief, p. 16)

The conclusion given by Caldwell is that the referral of an award to the trial court for initial disposition is "the usual and better practice", but not an across-the-board rule of general applicability. And it is difficult to understand why it would have been a "better practice" to remand for a fee determination when the Court of Appeals, upon being presented with the issue, concluded that no fee should be awarded. Certainly this is not a legal posture calling for certiorari: no conflict is shown, and no public interest issues are presented of sufficient importance to warrant review by this Court.

4. The last contention of the Petitioners is in the nature of an *ad hominem* argument, which evidences an effort to develop a hypothetical conflict. Petitioners hypothesize that the Eighth Circuit has adopted the view that appellate services under Sec. 1988 are "costs" controlled by Fed. R. App. P. 39. On this assumption a conflict is asserted with other circuits and the "implication" of *Roadway Express Inc.* v. *Piper,* 447 U.S. 752 (1980).

This exercise in speculation could hardly be considered as adequate basis for warranting this Court's intervention on certiorari. In point of fact the record dispels the assumptions of the Petitioners.

There is no basis for imputing to the Eighth Circuit lack of knowledge of the difference between costs and attorneys' fees, although there are several statutes which use the two terms interchangeably. Even the statute upon which the petition is predicated provides for "attorney's fee as part of the costs".

The Order rendered by the Eighth Circuit on March 3, 1980 in *Adams* v. *United States, supra,* provides that "the appellants requesting attorneys' fees on appeal shall submit a motion to that effect" (l.e. 1297). Petitioners followed the Court's direction and filed their Motion for "appeal costs" and attorneys' fees (Appendix 1, p. 1). At that time there was no "disarray" in the procedures of the appellate court (compare Petition, p.

15, Section 2). Petitioners understood the language of the Eighth Circuit, knew how to comply with the requirements of the court, and collected their award both on "costs" and on "fees", without making complaints or objections of any sort. At that time Petitioners were the prevailing party, were paid what the court ordered and appeared satisfied with the substance and procedure.

In 1981, Petitioners' situation is different. They did not win the case, they were not the prevailing party, and the Eighth Circuit, which had ample briefs and heard an extended argument, decided against Petitioners virtually on all issues and as a corollary also on the issue of their fee.

The appellate court order of April 28, 1980 leaves no doubt the Eighth Circuit distinguished between fees and costs. Hence Appellate Rule 39 was not relied upon by the appellate court in 1981 as it was not in 1980 and prior thereto, and clearly played no part in the dispostition of the attorneys' fee issue.

Thus, there is no conflict between the decision of the Eighth Circuit based on the controlling premise that a fees' award under Sec. 1988 can only be made to the prevailing party and Petitioner's cases (Pet. 18) such as *Vasquez* v. *Fleming*, 617 F.2d 334, 335 (3rd Cir. 1980) and *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978) which hold that attorneys' fees are not included as costs under Fed. R. App. P. 39.[1]

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[1] *Roadway Express Inc.* v. *Piper*, 447 U.S. 752 (1980) cited by Petitioners at p. 18, has no actual bearing upon the factual situation, law and issues involved here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition of Respondents Board of Education of the City of St. Louis, *et al.*, was mailed, postage prepaid, this 21st day of July, 1981 to:

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APPENDIX

APPENDIX 1

Motion of Caldwell Appellants For Fees

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 79-1468; 79-1470; 79-1471;
79-1477; and 79-1486

Craton Liddell, *et al.*,
Plaintiffs-Appellants,
and
Earline Caldwell, *et al.*,
Intervening Plaintiffs-Appellants,
v.
Board of Education of the City of
St. Louis, *et al.*, and State of
Missouri, *et al.*,
Defendants-Appellees.

Appeals From The United States District Court
For The Eastern District of Missouri
Eastern Division

MOTION OF CALDWELL APPELLANTS FOR AWARD OF STATUTORY COSTS AND REASONABLE ATTORNEYS' FEES FOR SERVICES RENDERED ON APPEAL

Pursuant to leave of Court granted at page 53 of the 7-judge opinion filed herein on 3 March 1980, the Caldwell appellants

(plaintiffs-intervenors below) respectfully move the Court for an award of statutory appeal costs in the amount of $1,716.97, and for an award of reasonable attorneys' fees for services rendered on appeal in the amount of $46,245.00. In support of this motion, the Caldwell appellants show the Court as follows:

1. In its 3 March 1980 slip opinion, at page 52, the Court directed the district court on remand to determine reasonable attorneys' fees for the Liddell group "and for the Caldwell group, if they requested them...." In their motion for leave to intervene as plaintiffs filed in the district court on 16 January 1976 (at page 6), the Caldwell appellants adopted the original complaint filed by the Liddell group on 18 February 1972 which, at page 10, prayed *inter alia* for an allowance of reasonable attorneys' fees. Hence, the Caldwell appellants have "requested" fees and are therefore to be included among "[t]he appellants requesting attorneys' fees on appeal..." Slip op. at 53.

2. Reasonable attorneys' fees for services rendered on these appeals, in which the Caldwell appellants are "prevailing parties," are authorized by 42 U.S.C. §1988 and 20 U.S.C. §1617. The Caldwell appellants are therefore entitled to an award of fees in the absence of special circumstances which would render such an award unjust. *E.g., Northcross* v. *Board of Educ. of Memphis City Schools,* 412 U.S. 427 (1972). There are no such special circumstances here. Moreover, the Caldwell appellants, as intervening prevailing parties, are entitled to recover fees in the same manner and to the same extent as an original prevailing party. *E.g., United States* v. *Board of Educ. of Waterbury,* 605 F.2d 573 (2d Cir. 1979).

3. As prevailing parties, the Caldwell appellants are entitled to recover fees for all time reasonably expended by their counsel on the appeal. *Brown* v. *Bathke,* 588 F.2d 634, 637-38 (8th Cir. 1978); *Crain* v. *City of Mountain Home,* 611 F.2d 726, 729n.7 (8th Cir. 1979); *Northcross* v. *Board of Educ. of Memphis City Schools,* 611 F.2d 624, 635-36 (6th Cir. 1979).

4. The amount of reasonable fees to be awarded is to be determined in accordance with the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *cert. denied*, 423 U.S. 864 (1975), adopted for this case by the 3 March 1980 slip opinion at pages 52-53. We submit that the Sixth Circuit's recent opinion in *Northcross, supra*, represents the most sensible application of the *Johnson* criteria. As stated in *Northcross*, 611 F.2d at 642-43:

> We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or indeed, how they are to be applied in a given case. We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. [1] The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." [2] The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." [3] Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts.

Applying the *Johnson* criteria, as summarized in the *Northcross* three-part analytical approach, to this case yields the following result.

5. *Hours of Work.* As reflected in the attached affidavits of counsel for Caldwell appellants, Richard B. Fields has rendered 280 hours of necessary services on this appeal (Fields Affidavit, Exhibit 1) and William E. Caldwell has rendered 70.25 hours of services (Caldwell Affidavit, Exhibit 1).

6. *Normal Billing Rates.* For comparable litigation on a non-contingent basis for fee-paying clients, Fields' regular billing rate is $60.00 per hour (Fields' Affidavit, paragraph 6), and Caldwell charges $90.00 per hour (Caldwell Affidavit, paragraph 9).

7. *Adjustments Upward.* The primary factor calling for an upward adjustment of the base fee in this case is the contingency factor. "[T]he most significant factor in these cases which....renders the routine hourly fee unreasonably low is the fact that the award [has been] contingent upon success." *Northcross, supra,* 611 F.2d at 638. Notwithstanding the unanimity of this Court's decision reversing the adverse judgment of the district court, it cannot be gainsaid that this appeal has been a highly contingent proposition. On this appeal, plaintiffs have been required to demonstrate that the district court's comprehensive decision, rejecting virtually all of plaintiffs' factual and legal contentions with respect to both liability and remedy, was wrong in its major premises. Not even through hindsight can it be argued that the path to ultimate victory was clearcut and free of risk. No reasonable litigant would view this appeal as anything but a high-risk undertaking. Accordingly, the determination of a reasonable fee for the Caldwell appellants "require[s] a substantial upward adjustment to compensate for the risk." *Northcross, supra,* 611 F.2d at 638; *see generally id.* at 638-39. We urge, therefore, that arriving at a reasonable fee

here necessitates an upward adjustment of at least 100% of the base hours-times-hourly-rate fee.[1]

8. *The Reasonable Fee.* In accordance with the foregoing analysis, the Court should compute the reasonable fee for counsel for the Caldwell appellants as follows:

Attorney	Hours	Hourly Rate	Base Fee	Total Fee With Upward Adjustment of 100%
FIELDS	280	$60.00	$16,800.00	$33,600.00
CALDWELL	70.25	$90.00	$ 6,322.50	$12,645.00
			$23,122.50	$46,245.00

9. In addition to the fees set forth above, the Caldwell appellants are due to recover in this Court so much of their costs as are governed by FED. R. APP. P. 39(c). Those costs, amounting to $1,716.97, are itemized in Exhibit 2 to the Fields Affidavit. (This amount does not include such out-of-pocket expenses as those necesarily incurred for lodging and travel, *Northcross, supra,* 611 F.2d at 639-40, nor those mentioned in FED. R. App. P. 39(e), all of which are properly recoverable in the district court.)

WHEREFORE, for the foregoing reasons, Caldwell appellants move the Court for an award of $1,716.97 in costs and $46,245.00 in reasonable attorneys' fees.

Dated: 31 March 1980

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[1]In cases of considerably less magnitude and contingency this Court has approved upward adjustments of 25% (*DiSalvo* v. *Chamber of Commerce of Greater Kansas City,* 568 F.2d 593 (8th Cir. 1978)) and 30%. *Cleverly* v. *Western Elec. Co., Inc.,* 450 F. Supp. 507, 512 (W.D. Mo. 1978), *aff'd,* 594 F.2d 638, 642 (8th Cir. 1979).

Respectfully submitted,

/s/ WILLIAM E. CALDWELL
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 79-1468; 79-1470; 79-1471;
79-1477; and 79-1486

Craton Liddell, *et al.*,
Plaintiffs-Appellants,
and
Earline Caldwell, *et al.*,
Intervening Plaintiffs-Appellants,
v.
Board Of Education Of The City Of
St. Louis, *et al.*, and State Of
Missouri, *et al.*,
Defendants-Appellees.

Appeals From The United States District Court
For The Eastern District of Missouri
Eastern Division

AFFIDAVIT OF RICHARD B. FIELDS

IN THE:
COUNTY OF SHELBY: SS:
STATE OF TENNESSEE:

I, RICHARD B. FIELDS, being duly sworn according to law, state as follows:

1. I am the lead attorney for the Caldwell appellants in the above-styled and numbered appeals. I submit this affidavit in

support of appellants' application for an award of costs and reasonable attorneys' fees.

2. I am admitted to practice before the Supreme Court of Tennessee, the United States District Court for the Western District of Tennessee, and the United States Courts of Appeals for the Sixth and Eighth Circuits. I am presently an associate with the law firm of Ratner & Sugarmon in Memphis, Tennessee.

3. As a law student and a licensed attorney, I have been involved primarily in the litigation of civil rights cases in the federal courts. Upon graduation from the University of Tennessee School of Law in March 1976 I immediately began work on the trial preparation of the Columbus, Ohio school desegregation cases. [*Penick* v. *Columbus Board of Education*]. In the spring of 1977 I served as associate counsel for a post-plan hearing in the Memphis school desegregation case. [*Northcross* v. *Board of Education of the City of Memphis*]. Prior to attending law school, I was employed as a program associate with the NAACP Legal Defense Fund for two years with responsibilities for monitoring school desegregation cases.

4. Since June 1977, after this Court's remand of this case, I have been the primary trial counsel for the Caldwell plaintiffs. I was solely responsible for most of the pre-trial preparation and lengthy trial that extended over a period of approximately one year. I prepared all the post-trial pleadings and authored the appellate briefs with the assistance of William E. Caldwell. (I have worked on this case under the overall supervision of the Office of General Counsel of the NAACP Special Contribution Fund, initially responsible to the Honorable Nathaniel R. Jones and then, after his appointment to the Court of Appeals for the Sixth Circuit, to Special Counsel Thomas I. Atkins; no fees are requested for their supervisory roles in these appeals.) I believe that my prior experience in school desegregation cases contributed significantly to a substantial savings of time and resources in this case and to the promptly-rendered critical decision of this Court on March 3, 1980.

5. Because of my intimate knowledge of the record, I was able to efficiently delineate the issues for appeal and write the briefs. In addition to the contents of the briefs as filed, I also prepared an extensive statement of facts which, in collaboration with Thomas I. Yannucci, counsel for the United States, was ultimately incorporated into the Joint Statement of Facts that appeared in the brief for the United States. The Joint Statement was utilized so as not to burden this Court with duplicative factual statements. My co-counsel on appeal, William E. Caldwell, reviewed my drafts and prepared the section in our opening and reply briefs on state liability. During the writing of the briefs and prior to oral argument, I also conferred with Norman J. Chachkin, an attorney with the Lawyers' Committee for Civil Rights Under Law and an experienced school desegregation litigator in this Circuit.

6. In preparation of this affidavit, I have reviewed my contemporaneous time records and the expense accounts kept by Ratner & Sugarmon in the ordinary course of business. Exhibit 1 hereto is an itemization of the services rendered by me to the Caldwell plaintiffs at the appellate level. Exhibit 2 hereto is a list of costs that were expended on appeal which are covered by Rule 39(c), Federal Rules of Appellate Procedure. My normal rate for services rendered in similar non-contingent litigation for a fee-paying client is $60.00 per hour.

Dated: 30 March 1980

/s/ RICHARD B. FIELDS

SWORN TO AND SUBSCRIBED before me, a Notary Public, this 30 day of March 1980.

/s/ Rosalyn Vaughn
NOTARY PUBLIC

My Commission Expires:
My Commission Expires December 27, 1983

EXHIBIT 1

SERVICES RENDERED BY RICHARD B. FIELDS IN APPELLATE PROCEEDINGS

Date	Description of Services	Hours
4-26-79	Phone Conversation with Tom Yannucci re: appeal date	.7
5-7-79	Phone call to Tom Yannucci	1.2
5-10-79	Phone call to Tom Yannucci re: timing of appeal	.7
5-30-79	Phone call to Tom Yannucci re: Adams Motion	.5
6-4-79	Prepare notice of appeal, letter to clerk, appeal bond - review new rules of appellate procedure	1.0
6-11-79	Review rules of appellate procedure and Eighth Circuit Rules re: designation and transmission of record	2.0
6-12-79	Review all pleadings to designate exhibits	2.5
6-13-79	Review transcript for designation	3.5
6-14-79	Phone call from Tom Yannucci, C. Atwood re: preparation of appendix	.4
6-18-79	Phone call from C. Atwood re: briefing schedule	.3
7-3-79	Read Columbus and Dayton U.S. Supreme Court Opinions	1.6
7-4-79	Review transcript cites and finish designation of record	2.5

7-12-79	Read and respond to U.S. Motion for Injunctive Relief	1.2
7-15-79	Research and analyze Judge Meredith's decision	5.0
7-17-79	Review Briefs of all parties	3.7
7-18-79	Dissect Judge Meredith's decision	5.0
7-19-79	Work on brief - preliminary work, procedural history	5.8
7-22-79	Work on brief	3.5
7-24-79	Work on brief - read NAACP Dallas brief	3.0
7-29-79	Work on brief	3.0
7-30-79	Work on brief	1.5
7-31-79	Work on brief	2.3
8-1-79	Work on brief	7.5
8-2-79	Work on brief, phone calls to Tom Yannucci, letter to W. Buckner	3.5
8-3-79	Prepare response to Adams motion, phone calls to Tom Yannucci; conference with law clerk about comparison of Judge Meredith's opinion and board's trial briefs	2.3
8-4-79	Work on brief	3.2
8-5-79	Work on brief; read index; letter to Mr. Rund	3.7
8-6-79	Phone calls to Tom Yannucci, W. Buckner; conference with Bill Caldwell, work on brief	2.5
8-7-79	Work on brief	4.5

8-8-79	Proofread draft of statement of facts, call Wayne Buckner, Tom Yannucci	2.5
8-9-79	Work on argument	1.3
8-10-79	Read orders, call Tom Yannucci, work on argument	3.2
8-11-79	Work on argument	5.5
8-13-79	Work on argument	3.4
8-15-79	Work on argument	5.5
8-16-79	Work on argument	3.0
8-19-79	Work on brief	2.0
8-22-79	Telephone call to Tom Yannucci re: statement of facts, work on brief, conference with Bill Caldwell, research on Addendum	2.8
8-23-79	Work on brief - revise; phone calls to J. Stewart, Tom Yannucci; motion to Eighth Circuit	3.5
8-24-79	Work on brief; Phone call to Eighth Circuit; Phone call from Tom Yannucci; Conference with Bill Caldwell	2.5
8-25-79	Work on facts with Bill Caldwell	1.2
8-27-79	Phone call to Tom Yannucci and get together state information; Read LDF Dallas brief, go over statement of facts	2.5
8-29-79	Redraft brief	3.5
8-30-79	Review brief with Norman Chachkin, make changes; phone call to Tom Yannucci; meet with Bill Caldwell re: state liability	2.7
8-31-79	Revise brief; phone call to Tom Yannucci	3.3

9-3-79	Work on brief	5.0
9-4-79	Redraft brief	10.0
9-5-79	Finish brief	5.0
9-10-79	Read other plaintiff's briefs	1.8
9-12-79	Phone call to Tom Yannucci re: Board's Extension of Time Motion	.5
11-14-79	Skim Brief of Board; Phone call to Tom Yannucci re: reply strategy	1.5
11-20-79	Phone calls from Tom Yannucci Phone call to Robert Tucker	.6 .2
11-26-79	Two letters to Robert Tucker	.3
11-27-79	Phone call to Bill Lamson re: location of raw data	.2
11-28-79	Phone call to Tom Yannucci re: Adams Brief	.2
11-28-79	Response to Adams' Enlargement Motion	.8
11-28-79	Read NAACP brief in Detroit school case (6th Cir.)	.7
11-30-79	Analyze Board's brief Phone call to Tom Yannucci	2.0 .2
12-2-79	Finish reading and analyzing Board's brief	2.0
12-3-79	Read Adams' brief, review U.S. Supreme Ct. Opinion in *Board of Educ.* v. *Califano* Phone call to Tom Yannucci	3.1 .2
12-4-79	Phone call to Tom Yannucci re: Adams' "reply" brief, Room-grade reports, capacity data	.4

12-5-79	Phone calls to Tom Yannucci, and W. Buckner re: continuance	.2
12-12-79	Phone call to Tom Yannucci re: Extension of Time	.6
	Phone call to Anthony Sestric	.3
12-13-79	Phone calls to W. Buckner, Tom Yannucci	.3
	Work on reply brief	1.9
12-14-79	Work on reply brief	1.2
12-15-79	Work on reply brief	1.3
12-16-79	Work on reply brief	5.8
12-17-79	Work on reply brief	5.6
12-18-79	Work on reply brief	6.7
12-19-79	Work on reply brief	9.2
12-20-79	Work on reply brief	4.2
12-21-79	Re-work brief, check citations and proof-read	4.0
12-26-79	Read Yannucci reply brief, city reply brief	.5
	Phone call to Tom Yannucci	.1
	Read Ninth Circuit Opinion in *Diaz*, Sixth Circuit Opinions in *Reed* v. *Rhodes* Trilogy	1.0
12-27-79	Phone calls to Tom Yannucci, NAACP National Office re: appellate argument	1.0
12-31-79	Read Eighth Circuit Order and phone call to Tom Yannucci	.2
1-2-80	Call Duke University	.1
	Read Adams letter	.1
	Research on Eighth Circuit school desegregation cases	5.5

1-3-80	Phone call to Tom Yannucci re: scheduling of oral argument	.4
	Research	3.0
1-4-80	Phone call from Tom Yannucci	.2
1-5-80	Research on new literature in school desegregation	3.0
1-6-80	Research - Symposium at Duke University in Law and Contemporary Problems	3.0
	Review Eighth Circuit school desegregation cases	3.2
1-8-80	Phone calls to Tom Yannucci, Bill Lamson, Dr. DeClue of St. Louis Branch NAACP, Eighth Circuit Clerk's office	1.3
	Research on Eighth Circuit school desegregation cases	2.7
1-9-80	Research on Eighth Circuit school desegregation cases	1.5
1-10-80	Research, phone calls from Tom Yannucci, Norman Chachkin	3.1
	Read and analyze *Kemp* opinions	2.0
1-11-80	Research on school desegregation case re: remedy	2.0
1-11-80	Travel to Washington	3.0
1-12-80	Confer with Tom Yannucci in Washington, D.C.	5.0
	Research in Washington, D.C.	1.5
1-13-80	Confer with Norman Chachkin in Washington, D.C.	2.5
	Travel to Memphis	3.0
	Work on argument in Memphis	4.5

1-14-80	Research, Practice Moot Court	5.7
1-15-80	Travel to St. Louis	2.0
	Meet with Plaintiffs' Attorneys	4.0
	Re-read Brief, Write Outline of Oral Argument	2.5
1-16-79	Oral Argument in Eighth Circuit	4.7
	Meet with Dr. DeClue and David Lang	1.0
	Travel to Memphis	2.0
3-30-80	Preparation of Fee Application	3.2
	TOTAL	280.0

EXHIBIT 2

STATUTORY COSTS INCURRED BY CALDWELL PLAINTIFFS IN APPELLATE PROCEEDINGS

Date	Description of Costs	Amount
	Xerox Expenses:	
	(a) Appellate Brief 29 Copies (88 pages) = 2,552 at $.15 a copy	$382.80
	(b) Covers for Appellate Brief	14.15
	(c) Reply Brief: 29 copies (55 pages) = 1,595 copies at $.15 a copy	239.25
	(d) Covers for Reply Brief	11.66
6-12-79	Docketing Fee Eighth Circuit Court of Appeals	50.00
10-5-79	Copying Expenses paid to the U.S. District Court Re: Original record filed with the Eighth Circuit Court of Appeals	817.50
12-18-79	Copying Expenses paid to Anthony Sestric Re: Additional Designation of the Original Record Filed with the Eighth Circuit Court of Appeals	201.61
	TOTAL	$1,716.97

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 79-1468; 79-1470; 79-1471;
79-1477; and 79-1486

Craton Liddell, et al.,
Plaintiffs-Appellants,

and

Earline Caldwell, et al.,
Intervening Plaintiffs-Appellants,

v.

Board of Education of the City of St. Louis, et al.,
and State of Missouri, et al.,
Defendants-Appellees.

Appeals From The United States District Court
For the Eastern District of Missouri
Eastern Division

AFFIDAVIT OF WILLIAM E. CALDWELL

STATE OF TENNESSEE:

SS:

COUNTY OF SHELBY:

WILLIAM E. CALDWELL, being duly sworn, deposes and says:

1. I am one of the attorneys for the Caldwell appellants (intervening plaintiffs below) in the above-styled and numbered

appeals. I have prepared this affidavit in support of the Caldwell appellants' motion for an award of costs incurred and attorneys' fees for services rendered in these appeals.

2. I am a partner (and have been since the spring of 1974) in the Memphis law firm of Ratner & Sugarmon [hereinafter, "the Firm"], which has performed the services to intervening plaintiffs referred to herein and in the affidavit of Richard B. Fields. From October 1974 until October 1978 I was on leave of absence from the Firm working with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C.

3. The Firm was formed in 1967. One of the principal purposes of this partnership was to attempt to help fill the void extant in the Memphis Bar with respect to providing effective legal representation to civil rights plaintiffs, especially those complaining of racial discrimination. Consequently, over the course of its existence, at least 40% of the Firm's lawyer-hours have been expended in the representation of civil rights plaintiffs; and the great majority of these cases have been handled without any, or at best token, fixed-fee retainers. The Firm has also frequently associated with the NAACP Special Contribution Fund [SCF] (as in this case) and the NAACP Legal Defense and Educational Fund, Inc. [LDF] in the trial of school desegregation cases around the country. In such cases, including this one, SCF or LDF has underwritten the expenses of litigation and provided an additional per diem allowance to help defer the Firm's overhead, though such per diem allowances have never been adequate to compensate the Firm for its total overhead costs in these cases.

4. I was admitted to the Tennessee bar in mid-1970 and to the District of Columbia bar in early 1976. In addition, I am admitted to practice law, and have practiced law, in the United States District Courts for the Western District of Tennessee and the District of Columbia, the United States Courts of Appeals for the District of Columbia, Fifth, Sixth and Eighth Circuits, and the Supreme Court of the United States. My practice has been

devoted primarily to civil rights litigation in the federal courts, mostly in cases involving claims of racial discrimination. I have participated in the trial and appeal of numerous school desegregation cases, such as this one, in the United States District Courts for the Western District of Tennessee [*Robinson* v. *Shelby County Bd. of Educ.* and *Northcross* v. *Memphis Bd. of Educ.*], for the Middle District of Tennessee [*Geier* v. *Dunn* (Tennessee higher education case involving, *inter alia*, the location of the main campus for Shelby State Community College)], for the Eastern District of Michigan [*Bradley* v. *Milliken* (Detroit)], for the Western District of Michigan [*Higgins* v. *Grand Rapids Bd. of Educ.*], for the Southern District of Indiana [*United States* v. *Board of School Comm'rs of Indianapolis*], and for the Southern District of Ohio [*Brinkman* v. *Gilligan* (Dayton) and *Penick* v. *Columbus Bd. of Educ.*]. I have briefed and/or argued five of these cases (some more than once) at the appellate level. Moreover, I have attended a number of national school desegregation conferences and seminars and have otherwise acquired considerable knowledge about the subject of school desegregation. Last year I argued *Dayton II* (I had previously briefed *Dayton I* in the Supreme Court, and briefed and argued *Dayton II* in the Sixth Circuit) before the Supreme Court of the United States (decision rendered 2 July 1979).

5. From the fall of 1968 until my graduation from Memphis State Law School (where I was editor-in-chief of the law review) in 1970, I was employed by the Firm as a law clerk. During that time I worked extensively with Louis R. Lucas (a former partner in the Firm who had principal responsibility for a number of SCF and LDF school cases) in all major aspects of the Memphis school desegregation case, *Northcross* v. *Memphis Bd. of Educ.* By the time I was admitted to the Tennessee bar in 1970, therefore, I was intimately familiar with school desegregation litigation.

6. I have participated, either by representing a party or filing *amicus* briefs for the Lawyers' Committee, in at least eight

voting rights cases (six of which were before the Supreme Court). I have also conducted extensive research into the history of the Reconstruction Amendments to the Constitution and implementing legislation. While with the Lawyers' Committee I had primary responsibility for the preparation of major *amicus* briefs on these subjects; among the cases in which such briefs were filed are *Warth* v. *Seldin, Jones* v. *Hildebrandt, Hutto* v. *Finney, Monell* v. *New York City Dept. of Social Services* and *Regents of University of California* v. *Bakke.*

7. I also have extensive experience in the litigation of requests for attorneys' fees in civil rights cases, particularly issues arising under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. I authored the Lawyers' Committee's *amicus* brief in *Hutto* v. *Finney* and co-authored the *amicus* brief in *Christiansburg Garment Co.* v. *EEOC.* I recently briefed and argued a large number of these issues for the plaintiffs in *Northcross* v. *Board of Educ. of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979). I have twice been qualified and testified as an expert witness on attorneys' fees in the Western District of Tennessee.

8. I have been familiar with the instant litigation since 1975 when the Caldwell plaintiffs first sought to intervene in the district court, later allowed by this Court (*Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977)), through the trial and the ultimate adverse decision rendered by the district court in 1979. During this time I frequently consulted on various issues with intervenors' principal counsel, first Louis R. Lucas (until recently a partner in the Firm), and later Richard B. Fields (an associate with the Firm), who has considerable school desegregation experience and who has managed the laboring oar for the Caldwell plaintiffs. I became actively involved in this case on the appeal to this Court leading to the *en banc* opinion and judgment filed 3 March 1980. I was primarily responsible for preparation to the state-liability parts of the Caldwell opening and reply briefs, and I assisted Richard B.

Fields in the preparation of the remaining parts of the briefs. As itemized in Exhibit 1, attached hereto, I have rendered 70.25 hours of necessary services in connection with this appeal.

9. My established rate for similarly complex federal litigation handled on a non-contingent basis for fee-paying clients is $90.00 per hour.

Dated: 30 March 1980

/s/ WILLIAM E. CALDWELL

SWORN TO AND SUBSCRIBED before me, a Notary Public this 30th day of March 1980.

/s/ ROSALYN VAUGHN
NOTARY PUBLIC

My Commission Expires:
My Commission Expires December 27, 1983

EXHIBIT 1

SERVICES RENDERED BY WILLIAM E. CALDWELL

Date	Description of Services	Hours
1. 8-25-79	Review of Rich's draft statement of case for 8th Cir. brief	3.0
2. 8-26-79	Review of Rich's draft argument and comments	4.5
3. 8-30-79	Research on state-liability issues	3.5
4. 9-1-4-79	Research on state liability issues and preparation of brief argument on state's liability	25.5

5.	12-20-79	Preparation of state liability section of reply brief	10.5
6.	1-10-80	Discussion with Richard Larson re: strategy; discussion with Rich Fields	1.5
7.	1-11-80	Strategy discussion with Rich Fields	.75
8.	1-14-80	Discussion with Rich Fields and moot court	3.5
9.	1-15-80	Travel to St. Louis and preparation with Rich Fields for oral argument	6.5
10.	1-16-80	Oral Argument in 8th Circuit (4.5 hrs) and return travel (2 hrs.)	6.5
11.	3-30-80	Preparation of affidavit and motion in 8th Cir. for costs and attorneys' fees	4.5
		TOTAL	70.25

CERTIFICATE OF SERVICE

I, RICHARD B. FIELDS, hereby certify that one copy of the foregoing Motion and attached affidavits were hand-delivered this 31st day of March 1980 to the following counsel of record:

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/s/ RICHARD B. FIELDS

APPENDIX 2
Order of the Court of Appeals
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1468

Janice Adams and Jack Adams, Jr., minors, by Jerrianne Adams, their natural guardian and next friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, minors, by Catherine Neel, their natural guardian and next friend, and Catherine Neel; Mary Edington and Susan Edington, minors, by Horace Edington, their natural guardian and next friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

v.

United States of America,

Appellee,

Board of Education of the City of St. Louis, and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents) and Robert E. Wentz (Superintendent of Schools),

Appellees.

No. 79-1470

United States of America,
Appellant,

v.

City of St. Louis,
Appellee,

Janice Adams and Jack Adams, Jr., minors, by Jerrianne Adams, their natural guardian and next friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, minors, by Catherine Neel, their natural guardian and next friend, and Catherine Neel; Mary Edington and Susan Edington, minors, by Horace Edington, their natural guardian and next friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,
Appellees,

Board of Education of the City of St. Louis, and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents) and Robert E. Wentz (Superintendent of School),
Appellees.

No. 79-1471

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, G. Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents) and Robert E. Wentz (Superintendent of Schools),

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 79-1477

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell, Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby, Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber, Nathalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore, Rachelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

v.

Board of Education of the City of St. Louis, and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

No. 79-1486

City of St. Louis,

Appellant,

v.

United States of America,

Appellee,

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents) and Robert E. Wentz (Superintendent of Schools),

Appellees.

Filed: April 28, 1980

Order of the Court by CHIEF JUDGE LAY, JUDGE HEANEY, JUDGE BRIGHT, JUDGE ROSS, JUDGE STEPHENSON, JUDGE HENLEY, JUDGE McMILLIAN and JUDGE ARNOLD, Circuit Judges.

This matter is before the Court on application of counsel for the appellants for attorneys' fees and expenses incurred in the appeal of this case.

1. Appellants Caldwell, et al, were represented by Richard B. Fields, William E. Caldwell and David A. Lang. These attorneys filed a joint brief. They requested attorneys' fees and expenses as follows:

Attorney	Hours		Hourly Rate		Base Fee		Multiplier[1]		Total
Fields	280.00	X	$60.00	=	$16,800.00	X	2	=	$33,600.00
Caldwell	70.25	X	$90.00	=	$ 6,322.50	X	2	=	$12,645.00
Lang	44.00	X	$90.00	=	$ 3,960.00			=	$ 3,960.00
									$50,205.00
								Expenses . . .	$ 1,716.97
									$51,921.97

2. Appellants Liddell, et al, were represented by the law firm of McDuffie and Russell. These attorneys filed a separate brief on behalf of appellants Liddell, et al. They requested attorneys' fees and expenses as follows:

Attorneys	Hours		Hourly Rate		Total
McDuffie & Russell	291	X	$95.00	=	$27,645.00
				Expenses . . .	$ 392.10
					$28,037.10

---

[1] Attorneys Fields and Caldwell have requested a 100% upward adjustment of the base fee because of the difficulty of the questions presented and the contingent nature of the case.

3. The United States of America was permitted to intervene and filed briefs that essentially supported the positions advocated by the appellants.

4. It is the order of the court that attorneys' fees in the sum of $18,000 be allowed to counsel for appellants *Caldwell,* et al, together with costs in the sum of $1,716.97. This fee is computed on the basis of $60.00 per hour for 300 hours of time spent in research, brief writing, preparation for oral argument and oral argument. Counsel may divide the fee as they see fit.

5. It is the order of the Court that attorneys' fees in the sum of $6,000 be allowed to counsel for appellants *Liddell,* et al, together with costs in the sum of $60.00. This fee is computed on the basis of $60.00 per hour for 100 hours of time spent in research, brief writing, preparation for oral argument and oral argument.

6. In determining the number of hours and the hourly rate to be allowed, we have taken into account the following factors: some duplication in effort by counsel, the complexity of the case and its contingent nature, the support received from the Department of Justice on behalf of the United States and the quality of the work performed.

7. The State of Missouri shall be responsible for the payment of one-third of the attorneys' fees and costs assessed, and the Board of Education of the City of St. Louis shall be responsible for the payment of the remaining two-thirds.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARLINE CALDWELL, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CITY OF ST. LOUIS AND JANICE ADAMS, ET AL., IN SUPPORT OF PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under 42 U.S.C. §1988 and Rule 39, F.R.A.P., attorney's fees of an arguably prevailing party for appellate services are items of "costs" to be disposed of as part of an appellate court's general award of costs on appeal?

2. Whether a court of appeals, under 42 U.S.C. §1988, may summarily grant or deny attorney's fees for services on the appeal to an arguably prevailing party?

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No. 81-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARLINE CALDWELL, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CITY OF ST. LOUIS AND JANICE ADAMS, ET AL., IN SUPPORT OF PETITION

STATEMENT OF THE CASE

Two parties below, the City of St. Louis and Janice Adams, et al., have joined in this brief. These Respondents have no disagreement with the statement of the case presented by Petitioners, as supplemented by the statement in the brief of Respondents Board of Education of the City of St. Louis, et al.

For convenience, and because only the City of St. Louis has been expressly directed to file a brief in response in the instant case (No. 81-16), the following discussion will refer only to Respondent City, but Adams, et al. concur in the views expressed herein.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED BECAUSE THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL PRACTICE AND PROCEDURE UNDER 42 U.S.C. §1988, WHICH OUGHT TO BE SETTLED BY THIS COURT.

Respondent City believes that the petition for writ of certiorari in this case actually presents two significant questions: first, whether attorney's fees for appellate services, claimed under 42 U.S.C. §1988, can properly be treated as items of costs under the rules of appellate procedure (and, inferentially, under other rules of civil procedure); and, second, whether it is within the province of an appellate court to summarily award or deny such fees. Because Respondent City believes that there are special and important reasons why these questions should be fully considered by this Court, see S.Ct. Rule 17.1, the City is constrained to support the petition in this instance.[1] Of course, in supporting plenary consideration of the questions presented by the petition, Respondent City is not to be understood as supporting Petitioners' right ultimately to recover the fees claimed by them. Indeed, the fact that there is room for dispute as to whether Petitioners "prevailed" on appeal below provides an additional illustration of the impropriety of summary appellate disposition of such claims for fees.

Both 42 U.S.C. §1988 and its Title VII counterpart, 42 U.S.C. §2000e-5(k), have created considerable confusion by providing for an award of attorney's fees to prevailing parties "as part of the costs." In *Roadway Express, Inc.* v. *Piper*, 447

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[1] Respondent City notes the pendency of another petition for certiorari, in No. 80-2152, arising out of the same judgment of the Court of Appeals. The City has previously waived its right to file a responsive brief in No. 80-2152, and, as previously stated, files this brief at the express direction of the Court.

U.S. 752 (1980), this Court expressed the view that, for purposes of 28 U.S.C. §§1920 and 1927, attorney's fees could not be regarded as "costs". In so doing, this Court rejected the notion that 42 U.S.C. §§1988 and 2000e-5(k) affected the meaning of the word "costs" in the former statutes which form part of the judicial code. However, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court placed great emphasis on the "costs" language of §1988 as permitting an award of fees against officers of a State, payable out of State funds. Because §1988 provided for an award of fees "as part of the costs," and "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity," it followed that §1988 authorized the award of such fees in *Hutto*, notwithstanding the Eleventh Amendment. 437 U.S. 695. Ironically, part of the award at issue in *Hutto* was a sum for appellate services apparently awarded *sua sponte* by the Court of Appeals for the Eighth Circuit, *id.* at 693; see 548 F.2d 743; but this was not the subject of review.

In light of *Hutto*, it is not surprising that many federal courts have been led to regard the award of attorney's fees as "costs" for purposes of the rules of procedure. Compare *White* v. *New Hampshire Dept. of Employment Security*, 629 F.2d 697 (1st Cir. 1980) (cert. pending, No. 80-5887) with *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980).[2] Here, the Court of Appeals apparently acted on the notion that fees for appellate services could be disposed of in the same manner as other costs under Rule 39, F.R.A.P. See Petition, 28a, 39a-40a. Yet this action is (not surprisingly) in conflict with that Circuit's own recent pronouncements. See *Obin* v. *District No. 9, I.A.M.*, 651 F.2d 574 (8th Cir. 1981).

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[2] Respondent City assumes that, insofar as the issues raised in the instant case are concerned, 42 U.S.C. §§1988 and 2000e-5(k) are *in pari materia*, and cases construing the one are relevant to construction of the other. Cf. *Hughes* v. *Rowe*, ___ U.S. ___, 101 S.Ct. 173 (1980); *Roadway Express, Inc.* v. *Piper*, *supra*, 447 U.S. 758 at n. 5.

It seems fairly clear that fees for services under 42 U.S.C. §1988 are not "costs" within Rule 39, F.R.A.P., any more than they can be deemed "costs" under 28 U.S.C. §§1920 and 1927 or Rules 54 and 58, F.R.Civ.P.; and such fees certainly should not be summarily granted or denied by an appellate court. "The decision whether to award attorney's fees under 42 U.S.C. §1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation." *Hughes* v. *Rowe, supra,* 101 S.Ct. at 183 (Rehnquist, J., dissenting). Grant or denial of fees by district courts nearly always requires an evidentiary hearing and detailed findings, see, e.g., *Mitchell* v. *Mid-Continent Spring Co.,* 583 F.2d 275 (6th Cir. 1978), cert. denied, 441 U.S. 922 (1979); *Prandini* v. *National Tea Co.,* 557 F.2d 1015 (3d Cir. 1978); *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). A district court which summarily denied fees to a prevailing party plaintiff would almost certainly be reversed. Cf. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). There seems to be no sound reason why these rules do not apply to awards for appellate services, and the need for hearings and findings compels the conclusion that fee awards even for appellate services are not the province of the appellate courts.

Petitioners appear (unwisely) to concede that an appellate court has the power to award (and, *a fortiori,* to deny) fees. Petition at 17. This is by no means clear. In the ordinary case, where the identity of the prevailing party and the extent to which he has prevailed is plain, no harm is done when an appellate court purports to grant such fees, so long as the fixing of the amount is left to the district court. Cf. *Verzosa* v. *Merrill Lynch, etc.,* 589 F.2d 974 (9th Cir. 1978); see also *Harris* v. *City of Fort Myers,* 624 F.2d 1321 (5th Cir. 1980). However, a school desegregation case is not an ordinary case. See *Davis* v. *Bd. of School Commissioners,* 526 F.2d 865 (5th Cir. 1976). In any event, the issue of attorney's fees under 42 U.S.C. §1988 almost always is best left to the district court, regardless of whether the fees are for trial or appellate services, and it seems clear that

Congress did not intend to vest the appellate courts with the discretion to award fees under §1988. See, e.g., *Northcross* v. *Bd. of Ed. of Memphis*, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); cf. *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970); *Hughes* v. *Rowe, supra.*

The Court of Appeals' disposition of the fee issue in this case is in stark contrast to its recent pronouncement under 42 U.S.C. §2000e-5(k) that the issue of attorney's fees is a "collateral and independent claim," not subject to procedural rules governing costs as such. *Obin* v. *District No. 9, I.A.M., supra.* The same differences between statutory attorney's fees and "costs" recognized in *Obin* counsel against summary grant or denial of fees for appellate services, by appellate courts. Since all of the circuits have treated this matter inconsistently at best,[1] it is appropriate for this Court to grant the writ of certiorari in this case and provide definitive guidance to the courts of appeals.

2. THE WRIT SHOULD BE GRANTED BECAUSE THE ARBITRARY AND CAPRICIOUS PRACTICE OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT UNDER 42 U.S.C. §1988 AND RELATED STATUTES, EXEMPLIFIED BY ITS DECISION IN THIS CASE, CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Albeit other courts have exhibited some confusion in their manner of awarding fees under 42 U.S.C. §1988 for appellate services, the court below is unique in its haphazard approach. Indeed, so unpredictable is the Court of Appeals for the Eighth Circuit in such matters that it is difficult to accuse that Court of a departure from "the accepted and usual course of judicial

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[1] See, e.g., *Harris* v. *City of Fort Myers, supra* (appellate fees to be fixed on remand); *Smith* v. *Fletcher*, 559 F.2d 1014 (5th Cir. 1977) (appellate court added fee for appeal, *sua sponte*); *Verzosa* v. *Merrill Lynch, etc., supra*, and cases cited in Petition at 17 notes 10 and 11.

proceedings" (S.Ct. Rule 17.1(a)) in this case. The most cursory examination of the cases reveals that this case epitomizes the accepted and usual course in the Eighth Circuit.

Respondent City is intimately acquainted with the Court of Appeals' practice of summary disposition of fees for appellate services. In *Firefighters Institute* v. *City of St. Louis,* 588 F.2d 235 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979), the Court of Appeals, while animadverting on the failure of the district court to disclose the basis of *its* fee award, affirmed the award for services at trial and then simply added $4,000 "for attorney's fees for the appeal." 588 F.2d 243. No affidavits or evidentiary materials of any kind relative to fees on appeal were filed by any party. The Court of Appeals' basis for its award remains a mystery. On a subsequent appeal, *idem,* 616 F.2d 250 (8th Cir. 1980), cert. denied, 101 S.Ct. 3079 (1981), nothing at all was said about fees or costs by the Court of Appeals, and the fee issue (including appellate services) was resolved in the district court.

In other cases under 42 U.S.C. §§1988 and 2000e-(k), as Petitioners show (see Petition at 18 notes 12-14), the Court of Appeals approaches fee awards with similar inconsistency. Aside from the cases cited by Petitioners, Respondent City would invite this Court to examine *Herrera* v. *Valentine,* 653 F.2d 1220 (8th Cir. 1981) and *Villanueva* v. *George,* ____ F.2d ____, No. 80-1085 (8th Cir. en banc, Sept. 16, 1981). In *Herrera,* the Court of Appeals proceeded as follows (653 F.2d at 1234):

> The costs of this appeal are taxed to the appellants. The appellee is hereby directed to file an affidavit with this Court within twenty days detailing her attoneys' fees in this appeal. The appellants will have ten days thereafter to respond.

In *Villanueva,* however, the Court simply stated (slip op. at 8):

> The judgment of the district court is affirmed in part and reversed in part, and the matter is remanded to the district court for action consistent with this opinion. Costs will be taxed to appellees, Leininger, Aumend and Buttice.

With regard to fees for appellate services, it is apparent that "the accepted and usual course of judicial proceedings" under 42 U.S.C. §1988 in the Eighth Circuit is sometimes to grant such fees summarily, sometimes to deny such fees summarily, sometimes to solicit evidentiary materials,[4] sometimes to act without evidence, and sometimes to say nothing or refer only to "costs" and let the parties sort the matter out for themselves. Clearly, this situation should not continue. The statute, assuming that it confers discretion on an appellate court to make any award of fees, surely did not confer such discretion unfettered by meaningful standards. In a related context, this Court has noted that invocation of judicial discretion by Congress requires a "principled application of standards" consistent with statutory purposes and not " 'equity [which] varies like the Chancellor's foot.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The manner in which the Court of Appeals for the Eighth Circuit has dealt with fees under 42 U.S.C. §1988 in this case and many others bears little, if any, resemblance to a principled application of standards, and only this Court can fit the lower court's foot with an appropriate shoe.

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[4] See *Adams* v. *United States*, 620 F.2d 1277, 1297 (8th Cir.), cert. denied, 101 S.Ct. 88 (1980) and Brief in Opposition of Respondents Board of Education, Appendix 2.

CONCLUSION

For the foregoing reasons, certiorari should issue to review and correct the decision below, preferably by vacating the Court of Appeals' judgment with instructions that the matter of fees be remanded to the district court.

Respectfully submitted,

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